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TRANSCRIPT OF RECORD

21

Supreme Court of the United States

OCTOBER TERM, 1927~~8~~

No. ~~740~~ 60

W. A. FROST, DOING BUSINESS UNDER THE NAME OF MITCHELL GIN COMPANY, APPELLANT,

vs.

CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, FRED CAPSHAW, FRANK CARTER, ET AL., ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

FILED FEBRUARY 3, 1928

(33,192)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 14, 1928

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[fol. 3]

IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 793. In Equity

W. A. Frost, Doing Business under the Name of Mitchell Gin Company, Complainant,

vs.

Corporation Commission of the State of Oklahoma, Fred Capshaw, Frank Carter, and E. R. Hughes, Constituting the Corporation Commission of the State of Oklahoma, and George Short, Attorney General for the State of Oklahoma, and the Durant Co-operative Gin Company, Defendants

Bill of Complaint—Filed April 14, 1926

W. A. Frost, doing business under the name of Mitchell Gin Company of Durant, Oklahoma, Complainant herein, brings this bill of complaint against the Corporation Commission of the State of Oklahoma, Fred Capshaw, Chairman, Frank Carter and E. R. Hughes, members, of the Corporation Commission of the State of Oklahoma, and against George Short, Attorney General for the State of Oklahoma, and the Durant Co-operative Gin Company, and each of them, and alleges the following:

I

The Complainant alleges that he is, and was at all times hereinafter mentioned, engaged in and duly authorized to engage in the operation of a cotton gin in the City of Durant, Oklahoma, under a license duly and regularly issued by the Corporation Commission of the State of Oklahoma under and by virtue of Article IV of Chapter 20, Compiled Laws of Oklahoma of 1921 as amended by Chapter 191 of

the Session Laws of Oklahoma of 1923 and by Chapter 109 of the Session Laws of Oklahoma of 1925.

[fol. 4] Complainant alleges that the Corporation Commission is and was at all times hereinafter mentioned, an administrative body created by the Constitution of the State of Oklahoma, having its offices and headquarters and principal place of business in the City of Oklahoma City, Oklahoma County, State of Oklahoma, and within the jurisdiction of the District Court of the United States for the Western District of Oklahoma, and that the defendants, Fred Capshaw, Frank Carter and E. R. Hughes, are, and at all times hereinafter mentioned were, the duly elected, qualified and acting members of the Corporation Commission of the State of Oklahoma with their headquarters in Oklahoma City, Oklahoma County, State of Oklahoma, and that George Short is, and was at all times hereinafter mentioned, the duly elected, qualified and acting Attorney General for the State of Oklahoma with his official headquarters in Oklahoma City, Oklahoma County, State of Oklahoma and within the jurisdiction of the District Court of the United States for the Western District of Oklahoma and under and by virtue of the laws of the State of Oklahoma is, and was at all times hereinafter mentioned, the duly authorized, qualified and acting attorney for said Corporation Commission of the State of Oklahoma.

Complainant alleges that the defendant, Durant Cotton Gin Company, is a domestic corporation organized under and pursuant to Article XIX of Chapter 34 of the Compiled Statutes of Oklahoma, 1921.

Complainant alleges that this is a suit in equity between citizens of the same State arising under and involving the construction and application of the Constitution and laws of the United States, and that the amount in controversy, exclusive of interest and costs, exceeds the sum of [fol. 5] $3000.00.

Complainant alleges that under and by virtue of Section 3712 of Chapter 20 of Article IV, Compiled Statutes of Oklahoma, 1921, that cotton gins are public utilities and the operation of same for the purpose of ginning seed cotton is a public business and that plaintiff in the operation of his said cotton gin at Durant, Oklahoma is engaged in a public business and that the said cotton gin is a public utility; that under and by virtue of Section 3715 of said

Chapter and Article aforesaid, the Corporation Commission is invested with the power and authority and is charged with the duty of regulating and controlling such cotton gins in all matters relating to the performance of such duties and the charges therefor, with power to fix rates, rules, charges and regulations to be observed by him and by all other persons operating gins in the State of Oklahoma and that by virtue of Section 3717 of said Chapter and Article said Corporation Commission is vested with the power and authority to enforce its orders against any person, firm, company or corporation maintaining or operating a gin or gins by imposing fines against him or them for the violation of any of its said orders.

Complainant further alleges that under the provisions of Section 3713 of said Chapter and Article that no person or persons or corporations in the State of Oklahoma are permitted to maintain and operate a gin for the purpose of ginning seed cotton, without first having secured a license for such purpose from the said Corporation Commission and that by virtue of Section 3714 of said Chapter and Article as amended by Chapter 109 of the Session Laws of 1925, that all persons and corporations are prohibited from constructing or installing, and the Corporation Commission is prohibited from licensing, any new gin plant until satisfactory showing shall have been made to the Corporation Commission setting forth that such gin is a needed utility and that the proposed corporation, company, firm or individual is a competent and desirable corporation, company, firm or individual to establish and operate said gin, as may appear in the discretion of said Commission, and that said provisions apply to all persons, firms, corporations and classes of people with the exceptions hereinafter set forth.

[fol. 6] Complainant further alleges that said Section 3714, as amended by Chapter 109 of the Session Laws of 1925 contains the following proviso:

"That on the presentation of a petition for the establishment of a gin to be run co-operatively, signed by one hundred citizens and tax payers of the community where the gin is to be located, the Corporation Commission shall issue a license for said gin."

Complainant alleges that the said defendant, Durant Co-operative Gin Company, heretofore on to-wit, the — day of —— 1926 filed its application and petition with the Corporation Commission of the State of Oklahoma for the establishment of a gin to be run co-operatively at Durant, in Bryan County, Oklahoma, under and by virtue of the provisions of said proviso; that Complainant herein on the 14th day of April, 1926, filed its written protest with said Corporation Commission against the issuance of a license to the said Durant Co-operative Gin Company, alleging in said protest that there were four gins already located and being operated in the City of Durant, Oklahoma; that said gins were ample to properly and adequately gin all the cotton raised in the vicinity of Durant, Oklahoma; that there was no necessity for the establishment and operation of another gin at said place and that a showing could not be made to the Corporation Commission that such gin so sought to be established and run by the said Durant Co-operative Gin Company is a needed utility, and that in fact said gin is not a needed utility; and further alleging that the granting of such license to and the establishment of such gin by the said Durant Co-operative Gin Company is and will be destructive of Complainant's business and will deprive him of his property without due process of law and would deny him the equal protection of the law in violation of and contrary to the Fourteenth Amendment to the Constitution of the United States and that the provisions of said proviso are discriminatory, arbitrary and violate the due process clause and equal protection clause of said Fourteenth Amendment to the Constitution of the United States.

[fol. 7] Complainant further alleges that when said case was called for hearing that Complainant offered to introduce evidence proving the matters and things alleged in his said protest aforesaid, whereupon the said Corporation Commission refused to hear any evidence thereon, holding that it was its mandatory duty to grant said license without any proof as to the need or convenience of such utility, by reason of the provisions of said proviso and that it was without jurisdiction, power or authority to pass upon the Constitutionality of said provision and stated that it would issue said license.

Complainant now avers that the provisions of said proviso are discriminatory, arbitrary and are in violation of and contrary to the due process clause and equal protection clause of the Fourteenth Amendment to the Constitution of the United States and if a license should be granted to the said Durant Co-operative Gin Company by virtue thereof and a gin established and operated by virtue of said license, that he would be deprived of his property without due process of law and would be denied the equal protection of the law.

Complainant further alleges that said Corporation Commission in granting the said license will not be acting legislatively but ministerially and no appeal lies under the laws of the State of Oklahoma from said order granting said license and the same will be enforcible immediately.

Complainant further alleges that unless restrained and enjoined the said Corporation Commission will issue such license to the said Durant Co-operative Gin Company to establish its gin at Durant, Oklahoma and the said Durant Co-operative Gin Company will so establish and operate said gin which will result in irreparable damage and loss to this Complainant by the impairment and practical destruction of Complainant's business without due process of law. Adequate relief at law therefore is not available to Complainant and by reason and virtue of all of said facts aforesaid and threatened acts of said Corporation Commission of the State of Oklahoma and the Durant Co-operative Gin Company of Durant, Oklahoma, and the penalty statute of the State of Oklahoma this Complainant is and will be deprived of his property without due process of law and will be denied the equal protection of the law.

[fol. 8] Wherefore, Complainant prays that the defendants, the Corporation Commission of the State of Oklahoma, Fred Capshaw, Frank Carter and E. R. Hughes constituting said Corporation Commission of the State of Oklahoma, and George Short, Attorney General of the State of Oklahoma, their assistants, agents and employees, and all persons acting through or under them, be restrained and enjoined from issuing the said license to the said Durant Co-operative Gin Company and that the defendant, Durant Co-operative Gin Company, its assistants, agents and employees and all persons acting through or under

them, be restrained and enjoined from the establishment and operation of a cotton gin at Durant, Oklahoma.

That this Court set this cause for hearing on application for interlocutory injunction on the — day of ——, 1926 and that on said hearing the Court issue its injunction, preliminary until final hearing and perpetual thereafter in accordance with said restraining order, and Complainant prays that in the meantime a temporary restraining order be issued in accordance with its prayer for said preliminary injunction, and in order that the said plaintiff may not suffer the irreparable injury and damage that it otherwise would suffer, as is alleged and charged in said bill of complaint.

That on said final hearing that said preliminary injunction be made perpetual as aforesaid.

That the Complainant may have such other and further relief as may be just, and equitable and necessary.

An this Complainant prays that there shall be issued out of this Court, directed to the Marshal, a writ of subpœna, to be served upon the defendants, directing them upon a certain day and under certain pain to be and appear before this Honorable Court and then and there true, direct and perfect answer to make to the premises, but not under oath, answer under oath to be expressly waived; and further, to stand to, abide and perform such other and further direction as may be conformable to equity and good conscience, as to this Court shall seem meet.

And your Complainant will ever pray.

W. A. Frost, by Robt. M. Rainey, Streeter B. Flynn,
[fol. 9] Geo. M. Green, Frank G. Anderson, Calvin Jones,
Attorneys for Complainant.

Duly sworn to by R. M. Rainey. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 10] In United States District Court

[Title omitted]

Motion to Dismiss and Answer—Filed April 24, 1926

Comes now the Defendants, Corporation Commission of the State of Oklahoma, Fred Capshaw, Frank Carter, and

E. R. Hughes, members thereof, and George Short, Attorney General of the State of Oklahoma, and the Durant Cooperative Gin Company, and for answer herein files this its motion to dismiss and answer the allegations contained in the bill of complaint filed herein as follows, to wit:

I

Defendants move the court to dismiss the bill of complaint herein for the following reasons, to wit:

a.) That bill of complaint and the allegations contained therein are insufficient in law or equity to constitute a basis for the relief sought.

b.) For the reason that this action is prematurely brought under the rule of comity existing and practiced by the Federal courts in their relationship to the State courts including the courts of the State of Oklahoma in that the matters and things contained and alleged in said [fol. 11] bill of complaint are now pending in a case in the Supreme Court of the State of Oklahoma and should be disposed of there as a condition precedent to seeking relief in this tribunal.

c.) For the reason that Complainant, W. A. Frost, has an adequate remedy at law in that he is entitled to an appeal from the contemplated action of the Corporation Commission of the State of Oklahoma as alleged in said bill to the Supreme Court of the State of Oklahoma, and that therefore he should pursue that remedy rather than the seeking of equitable relief herein.

d.) For the reason that no constitutional right of said Complainant, W. A. Frost, is shown by said bill to be involved or violated by the contemplated action of Defendants herein, or any of them.

II

Defendants and each of them further answering, admit that Complainant is engaged in and duly authorized to engage in operation of the cotton gin in the City of Durant, Oklahoma, under a license duly and regularly issued by the Corporation Commission of the State of Oklahoma under and by virtue of Art. IV. of Chapt. 20, Complied Laws of Oklahoma of 1921, as amended by Chapt. 191 of the Session

Laws of Oklahoma of 1923 and by Chapt. 109 of the Session Laws of Oklahoma of 1925.

Defendants and each of them admit that the Corporation Commission of the State of Oklahoma is and was at all times mentioned in said bill of complaint, an administrative body created by the Constitution of the State of Oklahoma having its offices and headquarters and principal place of business in the City of Oklahoma City, Oklahoma County, State of Oklahoma, and within the jurisdiction of the District Court of the United States for the Western District of Oklahoma, and that the Defendants, Fred Cap- [fol. 12] shaw, Frank Carter, and E. R. Hughes, are and at all times mentioned were the duly elected, qualified and acting members of said Commission, with their headquarters in Oklahoma City, Oklahoma County, State of Oklahoma, and that George Short is and was at all times mentioned duly elected, qualified and acting Attorney General for the State of Oklahoma with his official headquarters in Oklahoma City, Oklahoma County, State of Oklahoma, and within the jurisdiction of the District Court of the United States for the Western District of Oklahoma, and that under and by virtue of the laws of the State of Oklahoma he is and was at all times mentioned a duly authorized and qualified Attorney for the State of Oklahoma and for the Corporation Commission of the State of Oklahoma. Defendants in this connection, however, allege that in addition to the administrative authority exercised by the Corporation Commission of the State of Oklahoma, to also possess legislative authority and in some instances exercise quasijudicial authority.

Defendants deny that this is a proper suit in equity between citizens of the State of Oklahoma arising under and involving the construction and application of the Constitution and laws of the United States and deny that the amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00.

Defendants admit that Defendant Durant Co-operative Gin Company is a domestic corporation organized under and pursuant to Article XIX of Chapter 34, Compiled Statutes of Oklahoma 1921.

Defendants admit that under and by virtue of Section 3712 of Chapter 20 of Article IV, Compiled Statutes of Oklahoma 1921, cotton gins are public utilities and that the

operation of same for the purpose of ginning seed cotton is a public business and that Plaintiff in the operation of his cotton gin at Durant, Oklahoma, is engaged in a public business and that the said cotton gin is a public utility. They further admit that under and by virtue of Section 3715 of said Chapter and Article, the Corporation Com- [fol. 13] mission is vested with the power and authority and is charged with the duty of regulating and controlling such cotton gins in all matters relating to the performance of such duties and the charges therefor, with power to fix rates, rules, charges, and regulations to be observed by him and all other persons operating gins in the State of Oklahoma and that by virtue of Section 3717 of said Chapter and Article the Corporation Commission is vested with the power and authority to enforce its orders against any person, firm, or corporation maintaining or operating a gin or gins by the imposition of fines against them for the violation of any said orders.

Defendants admit that under the provision of Section 3715 of said Chapter and Article that no person or persons or corporations of the State of Oklahoma are permitted to maintain or operate a gin for the purpose of ginning seed cotton without first having secured a license for such purpose from the Corporation Commission, and that by virtue of Section 3714 of said Chapter and Article as amended by Chapter 109 of the Session Laws of 1925 that all persons and corporations are prohibited from the constructing or installing any new gin plant until satisfactory show ing shall have been made to the Corporation Commission setting forth that such gin is a needed utility and that the proposed corporation, company, firm, or individual is a Competent and desirable corporation, company, firm, or individual to establish and operate said gin as may appear in the discretion of said Commission, and that said provisions apply to all persons, firms and corporations and classes with the exceptions set forth by the bill of complaint.

Defendants and each of them admit that said Section 3714 as amended by Chapter 109 in the Session Laws of 1925 contains the following proviso, to wit:

[fol. 14] "That on the presentation of a petition for the establishment of a gin to be run co-operatively, signed

by one hundred citizens and tax payers of the community where the gin is to be located, the Corporation Commission shall issue a license for said gin."

Defendants admit that Defendant Durant Co-operative Gin Company did on — day of ——, 1926, file its application and petition with the Corporation Commission of the State of Oklahoma for the establishment of a gin to be run co-operatively at Durant in Bryan County, Oklahoma, under and by virtue of the provisions of said proviso; That Complainant herein did on the 14th day of April 1926, file its written protest with said Corporation Commission against the issuance of said license to the Durant Co-operative Gin Company, alleging in said protest that there were four gins already located and being operated in the City of Durant, Oklahoma, and that said gins were ample to properly and adequately gin all the cotton raised in the vicinity of Durant, Oklahoma, and that there was no necessity for the establishment and operation of another gin at said place, and that a showing could not be made to the Corporation Commission that such gins so sought to be established and run by the said Durant Co-operative Gin Company, is a needed utility and that in fact said gin is not a needed utility; that said protest further alleged that the granting of such license to and the establishment of such gin by applicant would be destructive of Complainant's business and would deprive him of his property without due process of law and would deny him equal protection of the law in violation of and contrary to the Fourteenth Amendment to the Constitution of the United States and that the provisions of said proviso are discriminatory, arbitrary, and violate the due process clause and equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

[fol. 15] Defendants also admit that when said case was called for hearing Complainant offered to introduce evidence proving the matters and things alleged in his protest aforesaid, but upon objection interposed by the representative of the applicant the Corporation Commission refused to allow the presentation of testimony thereon, holding that under the statutes as amended, it was a mandatory duty to grant such license wihout proof as to the need or convenience of such utility, and that it was without jurisdic-

tion, power, or authority to pass upon the constitutionality of said provisions as stated and announced that the license would be issued after conference between the entire membership of the Commission.

III

Defendants and each of them deny specifically the contents of said protest together with the allegations set forth therein; deny that gins already operating in Durant are ample to efficiently and adequately gin all the cotton raised in Durant, and deny that there was no necessity for the operation of another gin at said place, or that a showing could not be made that such gin so sought to be established and run by the said Durant Co-operative Gin Company is a needed utility and deny the allegation that said gin is not a needed utility.

IV

Defendants and each of them deny that the provisions of the proviso enacted by the 1926 Session of the Legislature and found in Chapter 109 of the Session Laws of 1925 are discriminatory, arbitrary or in any way violative of or contrary to the due process clause or equal protection clause of the Fourteenth Amendment to the Constitution of the United States. They further deny that the issuance of a license to Defendant Durant Co-operative Gin Company would in any way deprive Complainant of his property without due process of the law or that it would [fol. 16] deny the equal protection of the law.

V

Defendants deny the allegation of the bill of complaint in which it is set forth that no appeal lies under the laws of the State of Oklahoma from the granting of a cotton gin license and deny that Complainant will be subject to any violation of his constitutional rights under the Federal Constitution by the immediate enforcement of any order granting such license, for the reason that Chapter 20, Article IV, Compiled Oklahoma Statutes 1921 as amended by Chapter 109 of the Session Laws of 1925 and in Section 3716 of said Chapter so amended provides as follows:

"Appeals to the Supreme Court. The orders made by said Commission fixing rates, charges, rules and regulations as to any person, persons or corporation operating any gin or gins may be reviewed on appeal to the Supreme Court in the same manner, form, jurisdiction and procedure as applied to such orders made relative to transportation and transmission companies."

In this connection, Defendants further answering, allege the fact to be that at the time of the filing of the protest herein before the Corporation Commission there were pending two other similar applications for license to run and operate a cotton gin co-operatively, to wit: an application for such a gin at the town of Kinta, Oklahoma, and an application for such a permit at the town of Bokchito, Oklahoma; that similar protests were urged in each of those cases to that which was interposed in the cause now before the court; that in the case of the application for such a permit at Bokchito a permit was on the — day of April, 1926, issued by the Commission pursuant to hearing had; that thereupon notice of an appeal to the Supreme Court of the City of Oklahoma was given and thereafter on the — day of April 1926 the Corporation Commission by Journal Entry duly made and entered allowed the appeal prayed for and ordered a transcript of the entire proceedings had before the Commission to be prepared and certified to the Supreme Court for use by that court in said appeal; that [fol. 17] the issues in said case now on appeal in the Supreme Court of the State are identical with issues in this cause; that by the provisions of Section 21 of Article IX of the Constitution of the State of Oklahoma such appeals shall have precedence on the docket of the Supreme Court, shall be heard and disposed of promptly by the court irrespective of its place or session next after the habeas corpus and the State cases already on the docket of the court. A copy of the notice of appeal in said cause, as well as a copy of the journal entry allowing same and ordering transcript of proceedings to be prepared and filed in the Supreme Court of the State of Oklahoma are each attached hereto marked, "Defendants' Exhibits A and B," respectively.

Further answering, Defendants and each of them aver that in the operation of the cotton gins now located in the City of Durant in ginning seed cotton as public utilities,

the facts will show that for the year 1924-25 under the rate in effect at that time with the gins operating therein, the gins in which Complainant is interested as owner or stockholder have made excessive profits upon said operation; that Complainant herein in addition to his ownership in what is known as the Mitchell Gin is also an interested owner and stockholder in the co-operative gin of Durant, and that the facts and records available disclose that for the ginning season 1924-25 the Mitchell Gin enjoyed a net earning over and above all operating expenses, taxes, and other charges, of 18 per cent. upon the book value thereof undepreciated; that what is known as the Co-operative Gin — per cent. of the stock of which is owned by Plaintiff, for the ginning season 1924-25 enjoyed a net earning on the book value undepreciated of 153.6 per cent. after allowing all operating expenses including taxes and that the two gins for the same year enjoyed an average net earning after deducting all operating expenses of 85.8 per cent.

[fol. 18] The Defendants further answering aver that the cotton production industry including the gathering, picking, ginning, and stowing and marketing thereof is a leading agricultural pursuit insofar as values are concerned within the State of Oklahoma; that the ginning, marketing and processing of said product is one that is subject to continual abuse in that a large proportion of the gins in the State of Oklahoma have been constructed and are operated by those persons who are also interested in the purchase of cotton-seed extract from the cotton as well as in the purchase of the staple after it is ginned and processed for marketing; that such concerns as are engaged with cotton-seed business as well as the cotton buying business and also operating gins in connection therewith have an advantage amounting to a virtual monopoly of such products within the State of Oklahoma.

That the State of Oklahoma through legislative enactments throughout the past has by the adoption of legislation designed to foster and encourage agriculture, enacted statutes permitting all persons as well as those engaged in agriculture and horticulture to organize for the purpose of conducting agricultural, dairy, live stock, irrigation, horticultural, mercantile, manufacturing, mechanical, and industrial business upon a co-operative plan; that pursuant

to said policy the Legislature of the State of Oklahoma has enacted two statutes, the first of which enacted by the 1917 Session of the Legislature of the State of Oklahoma and effective June 14, 1917 is found in Article XVI Chapter 34, Compiled Oklahoma Statutes 1921 and provides that co-operative agricultural or horticultural associations instituted for the purpose of mutual help and not having capital and stock or conducted for profit may be formed under the provisions of this act by any number of persons, not less than five, to engage in agriculture or horticulture. It outlines the provisions which are to be incorporated in the articles of association, the powers of such association, the [fol. 19] admission of members into the Association, the manner and way in which the business of such concern may be operated, all of which is for the mutual benefit and for the purpose of rendering services described in its articles of association to membership only, this act is strictly and distinctly non-profit, mutual, self-help organiaztion and is clearly distinguishable in every material respect from the ordinary corporation organized for profit and for the purpose of engaging in corporate enterprises.

The second statute, adopted by the Session of the Legislature of 1919 and approved April 4, 1919, provides that ten or more persons may form a corporation for the purpose of conducting an agricultural, dairy, live stock, irrigation, horticultural, mercantile, mining, manufacturing, mechanical or industrial business upon a co-operative plan and with their associates, successors and assigns may become and be a body politic and corporate by complying with the provisions of this act. This act as amended by the Legislature of 1923 as shown by Chapter 167, Session Laws 1923, authorizes ten or more persons who may so desire to incorporate co-operatively to engage in the enterprises and business set forth in the first section thereof. The act provides in detail the requisites for articles of incorporation, the way and manner in which said articles may be amended, the powers to be exercised by said corporations, the amount of stock to be held and that no stock shall be sold at less than par value, that 20 per cent. of the par value of the stock subscribed for shall be paid in before the corporation commences business, and that no certificate of stock shall be issued to any person until the full amount of the subscrip-

tion thereof shall have been paid, that no person shall become a shareholder except by consent of the Board of Directors and that not more than 5 per cent. of the stock outstanding at any time and not more than $500.00 in par value shall be held by or for one person, firm or corporation; that each shareholder or subscriber shall only be entitled [fol. 20] to one vote and no more, irrespective of the number of shares owned; that if the indebtedness at any time of the corporation shall exceed the amount of its subscribed capital stock and surplus, the Directors assenting thereto shall be personally and individually liable for such excess to the creditors except for indebtedness created in favor of the State warehouse revolving fund. Section 5648 of said chapter provides for the apportionment in the handling of the profits and earnings of such associations from time to time not less than once in each year and imposing the following requirements:

"1) Not less than ten per cent thereof accruing since the last apportionment shall be set aside in a surplus or reserve fund until such fund shall equal at least fifty per cent of the paid up capital stock.

"2) Dividends at a rate not to exceed eight per cent per annum, may, in the discretion of the directors, be declared upon the paid up capital stock. Five per cent may be set aside for educational purposes.

"3) The remainder of such net earnings and profits shall be apportioned and paid to its members ratably upon the amounts of the products sold to the corporation by its members, and the amounts of the purchases of members from the corporation; provided, that if the by-laws of the corporation shall so provide the directors may apportion such earnings and profits in part to non members upon the amounts of their purchases and sales from or to the corporation."

Section 5651 prohibits the use of the word "co-operative" by by any person, firm, or association other than such as shall be organized under the terms of said act, and also provides for the forfeiture of the charter of any corporation organized under the act which fails to comply with all provisions of the act and further authorizes the Secretary of State to recall the charter of any such corporation.

Moreover, with respect to the distinction and classification by the Legislature of the State of Oklahoma and cooperative concerns engaged in the ginning of cotton as public utilities, defendants aver that the same distinction has been made by Congress of the United States in various acts of legislation by that body; one of the latest instances of which is the Federal Revenue Act of 1921, which by the [fol. 21] terms thereof, in Sec. 231, expressly distinguishes and classifies such organizations and associations by exempting them from the payment of income taxes.

VI

Defendants further answering aver that the Durant Cooperative Gin Company is a cooperative corporation organized under Article 19 Compiled Oklahoma Statutes 1921 as amended by Chapter 167 Session Laws 1923, permitting ten or more persons to form such an organization for the purpose of conducting an agricultural, dairy, live stock, irrigation, horticultural, mercantile, manufacturing, mechanical or industrial business on a cooperative plan; that a copy of its articles of incorporation is attached hereto and made a part hereof, marked Exhibit "C."

Under the head of the purposes for which this corporation is formed, there are set out numerous distinguishing characteristics, the most important of which is contained in paragraph A thereof, which reads as follows, to-wit:

"To handle co-operatively and collectively the problem of ginning, grading, handling, processing, storing, shipping, warehousing and marketing cotton and cotton products."

That said corporation is composed of 112 cotton growers, citizens and taxpayers of Bryan County, Oklahoma, as shown by a certificate of the secretary thereof, under oath, attached hereto and made a part hereof and marked Exhibit "D," who have associated themselves for the purposes disclosed by said articles of incorporation, under the terms of said statute; that the petition submitted to the Corporation Commission as a basis for action by it in the granting of a license or permit to engage in cooperative ginning, which gave rise to this cause of action, is signed

by the 112 stockholders who are also citizens and taxpayers of Bryan County, Oklahoma, as is disclosed by a certificate from the County Treasurer of Bryan County, Oklahoma, which certificate is attached hereto and made a part hereof and marked Exhibit "E."

[fol. 22] Defendants further allege and aver that pursuant to Section 5648 Compiled Oklahoma Statutes 1921, and pursuant to numbered paragraph 3 thereunder, the Durant Cooperative Company, has provided by its By-laws for the apportionment of earnings and profits of said association to non members who may patronize said corporation on the amount of gin patronage shown by the books of the corporation.

Moreover defendants further allege and aver that the citizens and taxpayers associating themselves together in the corporation aforesaid, were authorized by the terms of the statute of the State of Oklahoma passed in 1917 and contained in Chapter 16 of said Article 34, in a non-profit non-stock association for the purpose of rendering service to the members of said association solely, and said defendant Durant Cooperative Gin Company now alleges and avers that in case it is found impracticable or illegal for it to organize under the terms of the 1919 statute that it will organize and operate as an association under the terms of the 1917 Act as a non-profit, purely cooperative and mutual association for the purpose of rendering service to its membership only, either of which organizations defendants allege and aver come within the amendment to the cotton ginning statute of 1925, providing for the licensing by the Corporation Commission of gins "to be run cooperatively."

Having fully answered all the matters and things alleged in said Bill of Complaint, the defendants and each of them pray this Honorable Court that said Bill of Complaint be dismissed and that the relief prayed for therein be in all things denied and that they go hence with their costs and without day.

E. S. Ratliff, Attorney for Defendants.

[fol. 23] EXHIBIT "A" TO MOTION TO DISMISS AND ANSWER

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

No. 7308

In re the Application of THE FARMERS COOPERATIVE GIN COMPANY OF BOKCHITO, OKLAHOMA, for a License to Operate a Cotton Gin Utility at Bokchito, Oklahoma

Notice of Appeal and Application for Supersedeas

Comes now B. E. Garrett, Joe T. Riddle, W. B. Abernathy, A. W. Chesnut, doing business under the firm name and style of Farmers Independent Gin Company of Bokchito, Oklahoma, as respondents, and respectfully show that they feel themselves aggrieved by the order of the Commission, made and entered in the above entitled cause or proceeding on the 16th day of April 1926, and to which order, the respondents have only received notice on this the 19th day of April 1926, and respondents give notice to the said Commission of its intention to appeal from the said order, granting to the said Farmers Cooperative Gin Company, a corporation, of Bokchito, Oklahoma, a license to construct and operate a gin utility at Bokchito, Oklahoma, to the Supreme Court of the State of Oklahoma.

The grounds of the said appeals are as follows:

I

That the Corporation Commission erred in holding that under the proviso of Section 3714 C. O. S. 1921 (Section 2 Chap. 109, Session Laws 1925) the Corporation Commission had no authority or jurisdiction to inquire into or hear evidence or to require a showing as to the necessity for or convenience of a cotton gin utility to any locality or as to the responsibility, reliability, qualification or capacity of the petition for a permit or license for the construction and operation of a cotton gin utility who present a petition [fol. 24] for the establishment of the said gin utility signed by one hundred (100) citizens and taxpayers of the community where the gin is to be located, and in granting the Farmers Cooperative Gin Company, a corporation, of

Bokchito, Oklahoma, a license to construct and operate a third ginning utility at Bokchito, Oklahoma, without making a showing of any kind or nature, that such additional gin is a needed utility and that the proposed corporation was responsible or reliable as is required to all other persons and corporations desiring a license to engage in such business.

II

That the Corporation Commission erred in sustaining the objection of the attorney for the said applicant, the Farmers Cooperative Gin Company of Bokchito, to the introduction of evidence offered on behalf of the respondents in support of the written objections and protests herein to the granting of the said license to the applicant herein.

III

That the proviso of the said Section 3714, C. O. S. 1921, wherein it is provided "that on the presentation of a petition for the establishment of a gin to be run cooperatively, signed by one hundred (100) citizens and tax payers of the community where the gin is to be located, the Corporation Commission shall issue a license for said gin", is unconstitutionad and void, being in violation of the Fourteenth Amendment to the Constitution of the United States at Sections 6 and 7 of Article 2 of the Constitution of the State of Oklahoma, in that the making of the said order of the Commission thereunder authorizing the construction and operation of the said gin utility in Bokchito, Oklahoma, operates to deprive the respondents of their said property without due process of law and depriving the respondents of the equal protection of the law.

IV

That the order of the Commission is contrary to the evidence.

V

That the said order is contrary to law.

The respondents respectfully request the Commission to make and certify the record in this case for transmission to a filing in the Supreme Court of the State of Oklahoma

and further pray the Commission to grant a supersedeas herein and to fix the amount of the bond superseding and suspending the effectiveness of the said order pending the termination of this appeal.

Lydick & McPherson, Attorneys for Respondents.

[fol. 25] State of Oklahoma,
Oklahoma County, ss:

I, Fred Riseling, Acting Secretary for the Corporation Commission of the State of Oklahoma, do hereby certify that I am the custodian of the records and files of the dockets and official files of the Corporation Commission of the State of Oklahoma and that the within and foregoing is a true and correct copy of the notice of appeal and application of supersedeas in re application of the Farmers Co-operative Gin Company of Bokchito, Oklahoma for a license to operate a cotton gin utility at Bokchito, Oklahoma.

Fred Riseling, Acting Secretary. (Seal.)

[fol. 26] Exhibit "B" to Motion to Dismiss and Answer

Before the Corporation Commission of the State of Oklahoma

No. 7308

In re The Application of the Farmers Co-operative Gin Gin Company of Bokchito, Oklahoma, for a License to Operate a Cotton Gin Utility at Bokchito, Oklahoma

Journal Entry

On the 16th day of April, 1926 the Corporation Commission of the State of Oklahoma made and promulgated its Order in the above styled and numbered cause by the terms of which the Farmers Co-operative Gin Company of Bokchito, Oklahoma, was granted and issued a license to construct, maintain and operate a cotton gin utility at Bokchito, Oklahoma.

On April 20th, 1926, B. E. Garrett, Joe T. Riddle, W. B. Abernathy and A. W. Chestnut, doing business under the

firm name of Farmers Independent Gin Company of Bokchito, Oklahoma, filed with this Commission its notice of appeal from said order granting said permit and praying this Commission for a supersedeas staying the effectiveness thereof pending an appeal to the Supreme Court of the State of Oklahoma. Numerous grounds are set forth in said notice and application which are said to be the basis of said appeal among which it is asserted that the Corporation Commission erred in holding that under the proviso of Section 3714, Compiled Oklahoma Statutes, 1921 as amended by Section 2, Chapter 109, Session Laws of 1925, the Corporation Commission has no authority or jurisdiction to inquire into or hear evidence as to the necessity for or convenience of a cotton gin utility in any locality or as to the responsibility, reliability, qualification or capacity of petitioners for such a permit; that the Commission erred in sustaining the objection of the representative of said applicant to the introduction of evidence offered on behalf of the respondents; that the provision of Section 3714, Compiled Oklahoma Statutes of 1921 as amended by Chapter 109 is unconstitutional and void being in violation of the Fourteenth Amendment to the Constitution of the United States and Sections 6 and 7 of Article 2 of the Constitution of the State of Oklahoma in that the making of said order operates to deprive the respondents of their said property without due process of law and depriving them of equal protection of the law; that the order of the Commission is contrary to the evidence; that the order is contrary to law.

Now, on this the 23d day of April, 1926 the Commission having under consideration said notice of appeal and the application for supersedeas and having given due consideration to all the matters and things pertaining thereto, it is of the opinion and finds that said B. E. Garrett, Joe T. Riddle, W. B. Abernathy and A. W. Chestnut doing business under the name of Farmers Independent Gin Company of Bokchito, Oklahoma, should be allowed to take their appeal from the order of the Commission to the Supreme [fol. 27] Court of the State of Oklahoma and that a true and complete transcript of all proceedings had in said matter before the Commission should be prepared, certified

to and transmitted to the Supreme Court for use by said court in said appeal.

The Commission is further of the opinion and finds that the application made by said Farmers Independent Gin Company for a supersedeas staying the effectiveness under the terms of said order should be denied.

Therefore, it is the order of the Commission, premises considered, that B. E. Garrett, Joe T. Riddle, W. B. Abernathy and A. W. Chesnut doing business as Farmers Independent Gin Company of Bokchito, be and they are hereby allowed their appeal from said order of the Commission to the Supreme Court of the State of Oklahoma.

It is the further order of the Commission that a true and correct transcript of all proceedings had before the Commission in such matter be prepared, certified to and transmitted to the Supreme Court to be used by that Court in said appeal.

It is the further order of the Commission that the application for supersedeas made herein staying the effectiveness of said order be and it is hereby denied.

Done at Oklahoma City, this the 23d day of April 1926.

Corporation Commission of Oklahoma. Fred Capshaw, Chairman. F. C. Carter, Commissioner. E. R. Hughes, Commissioner.

Attest: Fred Riseling, Acting Secretary.

[fol. 28] STATE OF OKLAHOMA,
Oklahoma County, ss:

1. Fred Riseling, Acting Secretary for the Corporation Commission of the State of Oklahoma, do hereby certify that I am the custodian of the records and files of the dockets and official files of the Corporation Commission of the State of Oklahoma and that the within is a true and correct copy of the Journal Entry promulgated by the Corporation Commission of the State of Oklahoma on the 23d day of April. 1926 allowing the appeal from the order of the Commission in Cause No. 7308 in re the application of the Farmers Co-operative Gin Company to Bokchito, Oklahoma for license to operate a cotton gin utility at Bokchito, Oklahoma and ordering a transcript of all proceedings had therein to be prepared, certified to and trans-

mitted to the Supreme Court of the State of Oklahoma to be used by that court on said appeal.

Fred Riseling, Acting Secretary. (Seal.)

[fol. 29] EXHIBIT "E" TO MOTION TO DISCUSS AND ANSWER

Corporation Commission of Okla., Cotton Gin Dept.
Received Feb. 3, 1926.

Articles of Incorporation of Co-operative Gin Corporation

Know all men by these presents; that we, whose names are hereto subscribed do hereby associate ourselves together for the purpose of forming a co-operative corporation under the provisions of the laws of the State of Oklahoma, and for that purpose state:

First

The name of this corporation shall be Durant Co-operative Gin Company.

Second

The purposes for which this corporation is formed are as follows:

(a) To handle co-operatively and collectively the problems of ginning, grading, handling, processing, storing, shipping, warehousing and marketing cotton and cotton products.

(b) To engage in any activity in connection with the ginning, grading, handling, processing, storing, shipping, warehousing and marketing of cotton or cotton products and in the financing of any such operations;

(c) To purchase and sell any cotton, cotton seed or cotton products and to purchase and sell machinery equipment or supplies used in any of the above mentioned activities by said corporation;

(d) To borrow money; to endorse, guarantee the payment of or secure in any way, commercial paper or negotiable instruments used or needed in the course of its activity as such corporation;

(e) To sell, issue, discount, or borrow money upon, any commercial paper or negotiable instruments, or promissory notes or warehouse receipts, or mortgages, or bonds, or any other kind of property or security owned by or under the control of said corporation;

(f) To purchase, or otherwise acquire, and to hold, own, exercise all rights of ownership, sell, transfer or pledge shares of the capital stock, or bonds, or securities of any corporation or association engaged in the ginning, grading, handling, processing, shipping, warehousing or marketing of cotton or cotton products;

(g) To buy, own, lease, contract for the use of and ex- [fol. 30] ercise all privileges of ownership over such real or personal property as may be necessary or convenient for the conduct and operation of any of the business of said corporation;

(h) To acquire, own or develop any interest in patents, trademarks or copyrights deemed necessary in the proper conduct of the business of the corporation.

(i) To do each and everything, necessary, suitable or proper in the judgment of the Directors of said corporation, anywhere throughout the world, for the accomplishment of any of the purposes or attainment of any one or more of the objects herein enumerated or which shall at any time appear conductive to or expedient for the interests or benefits of this corporation and pursuant thereto, to enter into any and all contracts deemed necessary by the Board of Directors for the furtherance of any of the purposes for which this corporation is formed.

Third

The principal place of business of this corporation shall be at Durant, in the County of Bryan, State of Oklahoma.

Fourth

The term for which this corporation shall exist shall be twenty (20) years.

Fifth

The capital stock of this corporation shall be $40,000.00 divided into 4000 shares of $10.00 each.

Sixth

No person, firm or corporation may at any time hold more than 5% nor more than Five Hundred ($500.00) Dollars worth, par value, of said stock.

Seventh

There shall be five (5) Directors of this corporation, and the following named shareholders shall constitute a Board of Directors until the first annual meeting of the stockholders and until their successors are elected and qualified.

C. E. Thornley, Pres. of Durant. R. 3. Okla. shares 10.

G. C. Jones, V. Pres. of Durant. R. 1. Okla. shares 10.

E. C. White, Sec. Treas. of Durant. R. 3. Okla. shares 10.

[fol. 31] P. H. Harville of Durant. R. 2. Okla. shares 5.

Mart Love of Calera, shares 10.

Eighth

The voting power of stockholders shall be one vote for each individual stockholder, irrespective of the amount of capital stock held by such stockholder.

In Witness Whereof, we have hereunto subscribed our names, this 2nd day of Feb., 1926.

C. E. Thornley, G. C. Jones, E. O. White, P. H. Harville, Mart Love.

[fol. 32] State of Oklahoma,
Bryan County, ss:

Before me, a Deputy Court Clerk within and for said County and State, and on this 2 day of Feb., 192—, personally appeared C. E. Thornley, G. C. Jones, E. O. White, P. H. Harville, Mart Love, to me well known to be the identical persons who executed the within and foregoing instrument, and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal the day and year above set forth.

Florence Worthys, Deputy Court Clerk. My commission expires —— — ——. (Seal.) Court Clerk, Bryan County, Oklahoma.

[fol. 33] EXHIBIT "D" TO MOTION TO DISCUSS AND ANSWER

Cause No. 7232. 4-14-26. Ex. 2, P-14

Durant, Oklahoma, March 27, 1926.

Known all men by these presents, that I, E. O. White Secretary Treasurer of the Durant Co-operative Gin Company of Durant Oklahoma, do solemnly swear that the list ther-to attached consisting of 112 names, is a true and correct list of the Stock-holders of the above Gin Company.

E. O. White, Sec.

Subscribed to and sworn to before me this 27 day of Mar. 1926. J. Walter Mills, County Clerk. My commission expires ——— ——. (seal.)

[fol. 34] Corporation Commission of Okla. Cotton Department. Received April 3, 1926.

Name	Address	Route
C. E. Thornley	Durant, Okla.	3
E. O. White	Durant, Okla.	3
G. C. Jones	Durant, Okla.	1
B. M. Duncan	Roberta, Okla.	
A. S. Tucker	Durant, Okla.	1
J. D. Oliphant	Durant, Okla.	
P. L. Harville	Durant, Okla.	2
S. S. Park	Durant, Okla.	1
Mart Love	Calera, Okla.	3
T. A. Stanford	Durant, Okla.	3
G. S. Simpson	Roberta, Okla.	
W. H. Acord	Durant. Okla	2
C. H. Mead	Durant, Okla.	2
W. E. Foster	Roberta, Okla.	
N. J. Park	Durant, Okla.	3
H. C. Harp	Durant, Okla.	1
J. E. Pickens	Durant, Okla.	1
W. C. Towne	Durant, Okla.	1
J. T. Harmon	Durant, Okla.	3
R. N. Duncan	Durant, Okla.	Silo
B. H. Tassey	Durant, Okla.	2
C. R. Colclasure	Durant, Okla.	2

Name	Address	Route
J. W. Goodman	Durant, Okla.	2
Ira Rambo	Durant, Okla.	2
W. A. Beal	Durant, Okla.	2
F. F. Miller	Durant, Okla.	2
N. G. Tadlock	Durant, Okla.	2
W. L. Munroe	Durant, Okla.	2
L. R. Riddle	Durant, Okla.	2
T. A. Rambo	Durant, Okla.	2
W. H. Shults	Durant, Okla.	2
W. A. James	Calera, Okla.	1
E. Caughron	Durant, Okla.	3
R. A. Mead	Durant, Okla.	1
J. W. Price	Durant, Okla.	
W. A. Dunn	Durant, Okla.	
N. C. Riddle	Durant, Okla.	1
J. F. Corbin	Durant, Okla.	1
S. B. Robinson	Roberta, Okla.	
T. E. Franklin	Durant, Okla.	1
C. A. Matingley	Durant, Okla.	1
W. F. Perry	Durant, Okla.	1
Edd Ward	Durant, Okla.	1
H. E. Matingley	Durant, Okla.	1
T. J. Corbin	Durant, Okla.	1
H. P. Heath	Durant, Okla.	1
J. E. Williams	Durant, Okla.	1
Bobb Miller	Durant, Okla.	1
J. W. Lynch	Durant, Okla.	1
J. Ben Lewis	Durant, Okla.	3
L. L. Hayworth	Durant, Okla.	3
C. J. Duncan	Durant, Okla.	3R
R. F. Woodward	Roberta, Okla.	
W. L. Prentis	Durant, Okla.	1
J. P. Davalt	Durant, Okla.	1
J. E. Dyer	Utica, Okla.	
A. E. Roberts	Durant, Okla.	1
Jas. M. Murphy	Durant, Okla.	1
B. W. Compton	Durant, Okla.	1
[fol. 35] N. Hines	Utica, Okla.	
W. H. Poff	Utica, Okla.	
J. F. Williams	Roberta, Okla.	

Name	Address	Route
G. W. Lloyd	Roberta, Okla.	
C. M. Tucker	Durant, Okla.	Rt.1
J. B. Andis	Durant, Okla.	1
J. A. Taxton	Durant, Okla.	1
C. G. Woodward	Durant, Okla.	1
S. F. Boatner	Durant, Okla.	1
S. K. McManus	Utica, Okla.	
W. A. Conditt	Durant, Okla.	3
J. M. Murphey	Durant, Okla.	3
G. L. Reinheart	Durant, Okla.	3
E. R. Carter	Durant, Okla.	
C. C. Johnson	Durant, Okla.	3
Fred C. Johnson	Durant, Okla.	3
G. F. Duke 4	Durant, Okla.	2
Frank Buford	Durant, Okla.	
S. G. Boatner	Durant, Okla.	1
J. M. Acord	Durant, Okla.	1
W. H. Acord	Durant, Okla.	1
J. D. Brown	Durant, Okla.	3
Ansel Moore	Durant, Okla.	3
F. E. Sharrell	Roberta, Okla.	
M. M. Smith	Durant, Okla.	1
D. P. Wedge	Durant, Okla.	3
S. D. Sorrell	Durant, Okla.	3
J. B. Childs	Durant, Okla.	3
T. E. Brock	Utica, Okla.	
J. Sam Wright	Utica, Okla.	
W. F. Fisher	Utica, Okla.	
C. C. Davis	Utica, Okla.	
A. T. Patterson	Utica, Okla.	
J. E. McCalib	Utica, Okla.	
W. M. Dillingham	Utica, Okla.	
S. J. Jones	Utica, Okla.	
W. G. Simpson	Durant, Okla.	3
Will Russell	Durant, Okla.	3
J. F. Acord	Durant, Okla.	1
W. M. Roberts	Durant, Okla.	3
J. R. Boston	Durant, Okla.	3
R. C. Carr	Utica, Okla.	
Wm. P. Ellis	Utica, Okla.	

Name	Address	Route
R. P. Williams	Roberta, Okla.	
W. A. Simmons	Roberta, Okla.	
S. S. Aldridge	Durant, Okla.	3
J. O. Carson	Durant, Okla.	3
W. B. Childs	Durant, Okla.	
E. L. Strickland	Roberta, Okla.	
L. M. Linville	Utica, Okla	
L. B. McManus	Durant, Okla.	3
L. J. Williams	Roberta, Okla.	
D. W. Loftis	Utica, Okla.	

[fol. 36] EXHIBIT "E" TO MOTION TO DISMISS AND ANSWER

Durant, Oklahoma, March 27, 1926.

Known all men by these presents , that I, J. A. Moore, by W. T. White, Dep. County Treasurer of Bryan County, Oklahoma, do solemnly swear that the list of 112 names attached hereto are all Tax payers and citizens of Bryan County, Oklahoma.

J. A. Moore, Co. Treas., by W. T. White, Dep.

Subscribed and sworn too before me this the 27th day of Mar., 1926. C. D. Robinson, Notary Public. My Commission Expires Oct. 7, 1929. (Seal.)

Corporation Commission of Okla., Cotton Department. Received April 3, 1926.

[fols. 37-40] *Motion to dismiss and answer, duly sworn to by Fred Capshaw et al. Jurats omitted in printing.*

[fols. 41-48] [File endorsement omitted.]

[fol. 49] IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION—Filed December 12, 1927

WILLIAMS, J.:

In the bill filed by complainant in this court on April 14, 1926, it is alleged that he is, and was at all times

hereinafter mentioned, engaged in and duly authorized to engage in the operation of a cotton gin in the City of Durant, Oklahoma, under a license duly and regularly issued by the Corporation Commission of the State of Oklahoma under and by virtue of Article IV of Chapter 20, Compiled Laws of Oklahoma of 1923 and by Chapter 109 of the Session Laws of Oklahoma of 1925, and that the defendant, Durant Cotton Gin Company, is a domestic corporation organized under and pursuant to Article XIX of Chapter 34 of the Compiled Statutes of Oklahoma, 1921. That cotton gins are public utilities and the operation of same for the purpose of ginning seed cotton is a public business and that complainant is engaged in public business as such, its said cotton gin being a public utility, and that under and by virtue of Section 3715 of said Chapter and Article the Corporation Commission is vested with the power and charged with the duty of regulating and controlling such cotton gins in all matters relating to the performance of such duties and the charges therefor, with power to fix rates, rules, charges and regulations to be observed by complainant and all others operating gins in the State of Oklahoma and that by virtue of Section 3717 of said Chapter and Article said Corporation Commission is vested with the power to enforce its orders against any person, firm, company or corporation maintaining or operating a gin or gins by imposing fines against him or them for the violation of any of its said orders, and that under the provisions of Section 3713 of said Chapter and Article no person or persons or corporations in the State of Oklahoma are permitted to maintain and operate a gin for the purpose of ginning seed cotton, without first having secured a license for such purpose from said Corporation Commission; that by virtue of Section 3714 of said Chapter and Article as amended by Chapter 109 of the Session Laws of 1925 all persons and corporations are prohibited from constructing or installing, and the Corporation Commission is prohibited from licensing, any new gin plant until satisfactory showing shall have been made to the Corporation Commission setting forth that such gin is a needed utility and that the proposed corporation, company, firm or individual is a competent and desirable corporation, company, firm or individual to establish and oper-

ate said gin, as may appear in the discretion of said Commission, and that said provisions apply to all persons, firms, corporations and classes of people with the exceptions [fol. 50] hereinafter set forth. That Section 3714, as amended by Chapter 109 of the Session Laws of 1925 contains the following proviso:

"That on the presentation of a petition for the establishment of a gin to be run co-operatively, signed by one hundred citizens and tax payers of the community where the gin is to be located, the Corporation Commission shall issue a license for said gin."

It is the contention of said complainant that said proviso violates the Fourteenth Amendment to the Constitution of the United States and for that reason no license should be issued to the Durant Cooperative Gin Company for such purpose.

Said defendants in their joint answer allege that the allegations contained in plaintiff's bill are insufficient in law or equity to constitute a basis for the relief sought, and that the defendant Durant Co-operative Gin Company had filed its application with said Corporation Commission for the establishment of a gin to be run co-operatively at Durant in Bryan County, Oklahoma, under and by virtue of the provisions of said proviso, and further deny that the provisions of said proviso are discriminatory, arbitrary or in any way violative of or contrary to the due process clause or equal protection clause of the Fourteenth Amendment to the Constitution of the United States. They further allege that in the operation of the cotton gins now located in the City of Durant in ginning seed cotton as public utilities, the facts will show that for the year 1924-25 under the rate in effect at that time with the gins operating therein, the gins in which Complainant is interested as owner or stockholder have made excessive profits upon said operation; that Complainant herein in addition to his ownership in what is known as the Mitchell Gin is also an interested owner and stockholder in the co-operative gin of Durant and that the facts and records available disclose that for the ginning season 1924-25 the Mitchell Gin enjoyed a net earning over and above all operating expenses, taxes, and other charges, of 18 per cent. upon the book

value thereof undepreciated; that what is known as the Co-operative Gin — per cent. of the stock of which is owned by Plaintiff, for the ginning season 1924-25 enjoyed a net earning on the book value undepreciated of 153.6 per cent. after allowing all operating expenses including taxes and that the two gins for the same year enjoyed an average net earning after deducting all operating expenses of 85.8 per cent * * * That the cotton production industry including the gathering, picking, ginning, and storing and marketing thereof is a leading agricultural pursuit in so far as values are concerned within the State of Oklahoma; that the ginning, marketing and processing of said product is one that is subject to continual abuse in that a large proportion of the gins in the State of Oklahoma have been constructed and are operated by those persons who are also interested in the purchase of cotton-seed extracted from the cotton as well as in the purchase of the staple after it is ginned and processed for marketing; that such concerns as are engaged with cotton-seed business as well as the cotton buying business and also operating gins in connection therewith have an advantage amounting to a virtual monopoly of such products within the State of Oklahoma. That the State of Oklahoma through legislative enactments throughout the past has by the adoption of legislation designated to foster and encourage agriculture, enacted statutes permitting all persons as well as those engaged in agriculture and horticulture to organize for the purpose of conducting agricultural, dairy, live stock irrigation, horticultural, mercantile, manufacturing, mechanical, and industrial business upon a co-operative plan; that pursuant to said policy of the Legislature of the State of Oklahoma has enacted two statutes, the first of which enacted by the 1917 Session of the Legislature of the State of Oklahoma and effective June 14, 1917, is found in Article XVI Chapter 34, Compiled Oklahoma Statutes 1921 and provides that co-operative agricultural or horticultural associations instituted for the purpose of mutual help and not having capital and stock and not conducted for profit may be [fol. 51] formed under the provisions of this act by any number of persons, not less than five, to engage in agriculture or horticulture. It outlines the provisions which are to be incorporated in the articles of association, the powers

of such associations, the admission of members into the Association, the manner and way in which the business of such concern may be operated, all of which is for the mutual benefit and for the purpose of rendering services described in its articles of association to membership only, this act is strictly and distinctly non-profit, mutual, self-help organization and is clearly distinguishable in every material respect from the ordinary private corporation organized for profit. The second statute, adopted by the Session of the Legislature of 1919 and approved April 4, 1919, provides that ten or more persons may form a corporation for the purpose of conducting an agricultural, dairy, live stock, irrigation, horticultural, mercantile, mining, manufacturing, mechanical or industrial business upon a co-operative plan and with their associates, successors and assigns may become and be a body politic and corporate by complying with the provisions of this act. This act as amended by the Legislature of 1923 as shown by Chapter 167, Session Laws 1923, authorizes ten or more persons who may so desire to incorporate co-operatively to engage in the enterprises and the businesses set forth in the first section thereof. The act provides in detail the requisites for articles of incorporation, the way and manner in which said articles may be amended, the powers to be exercised by said corporations, the amount of stock to be held and that no stock shall be sold at less than par value, that 20 per cent. of the par value of the stock subscribed for shall be paid in before the corporation commences business, and that no certificate of stock shall be issued to any person until the full amount of the subscription thereof shall have been paid, that no person shall become a shareholder except by consent of the Board of Directors and that not more than 5 per cent. of the stock outstanding at any time and not more than $500.00 in par value shall be held by or for one person, firm or corporation; that each shareholder or subscriber shall only be entitled to one vote and no more, irrespective of the number of shares owned; that if the indebtedness at any time of the corporation shall exceed the amount of its subscribed capital stock and surplus, the Directors assenting thereto shall be personally and individually liable for such excess to the creditors except for indebtedness

created in favor of the state warehouse revolving fund. Section 5648 of said chapter provides for the apportionment in the handling of the profits and earnings of such associations from time to time not less than once in each year and imposing the following requirements:

"(1) Not less than ten per cent thereof accruing since the last apportionment shall be set aside in a surplus or reserve fund until such fund shall equal at least fifty per cent of the paid up capital stock.

"(2) Dividends at a rate not to exceed eight per cent per annum, may, in the discretion of the directors, be declared upon the paid up capital stock. Five per cent may be set aside for educational purposes.

"(3)The remainder of such net earnings and profits shall be apportioned and paid to its members ratably upon the amounts of the products sold to the corporation by its members, and the amounts of the purchasers of members from the corporation; provided, that if the by-laws of the corporation shall so provide the directors may apportion such earnings and profits in part to non members upon the amounts of their purchases and sales from or to the corporation."

It is further pleaded in said answer that with respect to the classification made by the Legislature of the State of Oklahoma as to co-operative concerns engaged in the ginning of cotton as public utilities that a like distinction has been made by the Congress of the United States in various acts of legislation, the latest instance being in the Federal Revenue Act of 1921, which, by Section 231, expressly dis-
[fol. 52] tinguishes and classifies such organizations and associations by exempting them from the payment of income taxes. It is further specifically pleaded in said answer that the defendant Durant Co-operative Gin Company is a co-operative corporation duly organized, a copy of the articles of incorporation being attached thereto as a part thereof and designated as Exhibit "C". Said by-laws recite that said corporation is formed for the following purposes:

(a) To handle co-operatively and collectively the problems of ginning, grading, handling, processing, storing,

shipping, warehousing and marketing cotton and cotton products.

(b) To engage in any activity in connection with the ginning, grading, handling, processing, storing, shipping, warehousing and marketing of cotton or cotton products and in the financing of any such operations.

It further provides that no person, firm or corporation may at any time hold more than 5% nor more than $500 worth, par value, of said stock. And further:

"The voting power of stockholders shall be one vote for each individual stockholder, irrespective of the amount of capital stock held by such stockholder."

It is further alleged that said corporation is composed of 112 cotton growers, citizens and taxpayers of Bryan County, Oklahoma, as shown by a certificate of the secretary thereof, under oath, attached hereto and made a part hereof and marked Exhibit "D", who have associated themselves for the purposes disclosed by said articles of incorporation, under the terms of said statute; that the petition submitted to the Corporation Commission as a basis for action by it in the granting of a license or permit to engage in cooperative ginning, which gave rise to this cause of action, is signed by the 112 stockholders who are also citizens and taxpayers of Bryan County, Oklahoma, as is disclosed by a certificate from the County Treasurer of Bryan County, Oklahoma, which certificate is attached hereto and made a part hereof and marked Exhibit "E". It is further averred that the Durant Co-operative Gin Company has provided by its by-laws for the apportionment of earnings and profits of said association to non-members who may patronize said corporation on the amount of gin patronage shown by the books of the corporation. It is further averred that the citizens and taxpayers associating themselves together in the corporation aforesaid, were authorized by the terms of the statute of the State of Oklahoma passed in 1917 and contained in Chapter 16 of said Article 34, in a non-profit non-stock association for the purpose of rendering service to the members of said association solely, and said defendant Durant Cooperative Gin Company now alleges and avers that in case it is found impracticable or illegal for it to organize under the terms of the 1919 statute that it will organize and operate as an

association under the terms of the 1917 act as a non-profit, purely cooperative and mutual association for the purpose of rendering service to its membership only, either of which organizations defendants allege and aver come within the amendment to the cotton ginning statute of 1925, providing for the licensing by the Corporation Commission of gins "to be run cooperatively."

Parties stipulate that complainant is engaged in the cottton ginning business under the name of Mitchell Gin Company owning said gin in the City of Durant, Oklahoma, same being operated by virtue of a license issued by the Corporation Commission under and by virtue of Article 40, Chapter 7, statutes 1921 as amended by Chapter 191 Session Laws of Oklahoma, 1923, and by Chapter 109 Session Laws of Oklahoma, 1925, and that Fred Capshaw, Frank Carter and C. C. Childers are the duly elected, qualified and acting members of the Corporation Commission of the State of Oklahoma, and that Edwin Dabney is the Attorney General of the State of Oklahoma, and that the amount in controversy, exclusive of interest and costs, exceeds the sum of $3000; the the Durant Co-operative Gin Company in 1926 filed its application with the Corporation [fol. 53] Commission for permission to establish a gin at Durant, Oklahoma; that complainant protested in writing against the issuance of a license or permit by the said Commission to the said Durant Co-operative Gin Company; that the articles of incorporation of said Durant Co-operative Gin Company are as follows:

"First

"The name of this corporation shall be Durant Co-operative Gin Company.

Second

"The purposes for which this corporation is formed are as follows:

"(a) To handle cooperatively and collectively the problems of ginning, grading, handling, processing, storing, shipping, warehousing and marketing cotton and cotton products.

"(b) To engage in any activity in connection with the ginning, grading, handling, processing, storing, shipping,

warehousing and marketing of cotton or cotton products and in the financing of any such operations;

(c) To purchase and sell any cotton, cotton seed or cottton products and to purchase and sell machinery equipment or supplies used in any of the above mentioned activities by said corporation;

(d) To borrow money; to endorse, guarantee the payment of or secure in any way, commercial paper or negotiable instruments used or needed in the course of its activity as such corporation;

(e) To sell, issue, discount, or borrow money upon any commercial paper or negotiable instruments, or promissory notes or warehouse receipts, or mortgages, or bonds, or any other kind of property or security owned by or under the control of said corporation;

(f) To purchase, or otherwise acquire, and to hold, own, exercise all rights of ownership, sell, transfer or pledge shares of the capital stock, or bonds, or securities of any corporation or association engaged in the ginning, grading, handling, processing, shipping, warehousing or marketing of cotton or cotton products;

(g) To buy, own, lease, contract for the use of and exercise all privileges of ownership over such real or personal property as may be necessary or convenient for the conduct and operation of any of the business of said corporation;

(h) To acquire, own or develop any interest in patents, trademarks or copyrights deemed necessary in the proper conduct of the business of the corporation.

(i) To do each and everything, necessary, suitable or proper in the judgment of the Directors of said corporation, anywhere throughout the world, for the accomplishment of any of the purposes or attainment of any one or more of the objects herein enumerated or which shall at any time appear conducive to or expedient for the interests or benefits of this corporation and pursuant thereto, to enter into any and all contracts deemed necessary by the Board of Directors for the furtherance of any of the purposes for which this corporation is formed.

[fol. 54] Third

The principal place of business of this corporation shall be at Durant, in the County of Bryan, State of Oklahoma.

Fourth

The term for which this corporation shall exist shall be twenty (20) years.

Fifth

The capital stock of this corporation shall be $40,000.00, divided into 4,000 shares of $10.00 each.

Sixth

No person, firm or corporation may at any time hold more than 5% nor more than Five Hundred ($500.00) Dollars worth, per value, of said stock.

Seventh

There shall be five (5) Directors of this corporation, and the following named shareholders shall constitute a Board of Directors until the first annual meeting of the stockholders and until their successors are elected and qualified.

C. E. Thornely, pres., of Durant, R. 3 Okla. shares, 10.
G. C. Jones V. pres., of Durant, R. 1, Okla.; shares, 10.
E. O. White, Sec. Treas. of Durant, R. 3, Okla.; shares 10.
P. H. Harville, of Durant, R. 2 Okla.; shares 5.
Mart Love of Calera; shares, 10.

Eighth

The voting power of stockholders shall be one vote for each individual stockholder, irrespective of the amount of capital stock held by such stockholder."

The sole objection made before the State Corporation Commission to the issuance of the license or permit was on the ground that the act under which it was sought was unconstitutional as violating the Federal Constitution, and that is the ground under which a writ of injunction is here sought. On the presentation of a petition for the establish-

ment of a gin to be run co-operatively, signed by 100 citizens and tax payers of the community in which the gin is to be located the said commission is to issue a license. Prior to enactment of the act of 1917 gins were operated by an individual, co-partnership or a corporation, no permit or license of any character being required. Since passage of act of 1917 a gin may be owned and operated by an individual, co-partnership or a corporation when necessity therefor is found by the Corporation Commission. Act of 1925 continues such practice except as provided in said proviso, it having effect of classifying the gin business and such gins as come within the class referred to in said proviso may operate without the necessity therefor being found and determined by the Corporation Commission. That the gin is "to be run co-operatively" and vouched for by a petition signed "by 100 citizens and taxpayers in the community where the gin is to be located", is all that is required. The legislature of the state has enacted two separate statutes authorizing the organization of co-operative concerns. Article 16, Chapter 34, Compiled Oklahoma Statutes, 1921, relates to agricultural and horticultural associations. Section 5599 thereof provides:

"Co-operative agricultural or horticultural associations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, may be formed, under the provisions of this act, by any number of persons, not less than five, engaged in agriculture or horticulture."

[fol. 55] Said act, as amended by Chapter 181, Session Laws 1923, (page 309) provides as follows:

"Any number of persons, not less than five, engaged in the production of agriculture or horticultural products may act together and organize co-operative associations, not having capital stock and not conducted for profit, for mutual help in collectively processing, preparing for market, picking, storing, shipping, handling, and marketing such products of persons so engaged; and the manufacturing or the making of the by-products thereof; or in the financing of any of the above activities; and may have marketing agencies in common with other like or similar associations; and such associations and their members may make all necessary contracts and agreements to effect such pur-

poses; and such association may make advances to members, and such members may hire, rent, or buy their farm supplies and machinery from or through the association; Provided, that such association shall be operated for the mutual benefit of the members thereof, only as such producers; and no member of the association shall have more than one vote because of the membership capital he may own therein; and such associations shall not pay dividends on membership capital in excess of eight per centum per annum. And co-operative associations, not having capital stock, now, existing in Oklahoma, exercising, or attempting to exercise, corporate rights and powers, or to perform duties as a corporation, for the purpose or any of the purposes aforesaid, are hereby validated, and are granted all of the rights and powers, and subjected to all of the restrictions and limitations of this Act, as herein amended; and are granted for the enforcement of existing as well as subsequent contracts, all of the rights and remedies herein provided."

Under this statute a co-operative gin may be organized by its growers and producers and operated for purpose of ginning seed cotton, preparing for market such cotton and seed, and the manufacturing of by-products thereof. A gin "to be operated co-operatively" is a classification different from the ordinary commercial gin for which an adjudication of necessity therefor is required. Such class acting in such a co-operative way in ginning and marketing their own agricultural products in preparing their own cotton and seed and products thereof for market is a reasonable classification and not violative of the Fourteenth Amendment.

As to said proviso for the issuance of license for gins "to be operated co-operatively" if two constructions equally reasonable may be reached, one rendering the proviso violative of the constitution and the other valid, that should be adopted which would permit it to stand, the presumption being that the legislature intended that which was permissible and valid and therefore in using the term "to be operated co-operatively" intended that such gin should be organized and operated under the co-operative act as contained in Article 16, Chapter 34, Compiled Oklahoma Statutes annotated 1921 and amendments thereto.

In American Sugar Refining Co. v. Louisiana, 179 U. S., 89, an act was involved providing for the licensing for the carrying on of business of refining sugar and molasses, the annual tax on such license to be based on the gross annual receipts of all persons, associations of persons or business firms and corporations engaged in said business, with the proviso that said section shall not apply to planters and farmers grinding and refining their own sugar and molasses, and further providing that it shall not apply to those planters who granulate syrup for other planters during the rolling season. In the opinion it is said:

[fol. 56] "The constitution of Louisiana classifies the refiners of sugar for the purpose of taxation into those who refine the products of their own plantations, and those who engage in a general refining business, and refine sugars purchased by themselves or put in their hands by others for that purpose, imposing a tax only upon the latter class. To entitle a party to the exemption it must appear (1) that he is a farmer or a planter: (2) that he grinds the cane as well as refines the sugar and molasses; (3) that he refines his own sugar and molasses, meaning thereby the product of his own plantation. Whether he may also refine the sugar of others may be open to question; although by its express terms the act does not apply to planters who granulate syrup for other planters during the rolling season. The discrimination is obviously intended as an encouragement to agriculture, and does not deny to persons and corporations engaged in a general refining business the equal protection of the laws."

(See also Citizens Tel. Co. v. Fuller, 229 U. S., 327.)

In Fidelity Mutual Life Association v. Mettler, 185 U. S. 326, it is said:

"The ground for placing life and health insurance companies in a different class from fire, marine and inland insurance companies is obvious, and we think that putting them in a different class from mutual benefit and relief associations doing business through lodges, and benevolent associations of the character mentioned in the Texas statutes, is not an arbitrary classification, but rests on sufficient reason. The legislature evidently intended to distinguish

between life and health insurance companies engaged in business for profit (and we are not called on to refine as to the distribution of such profits), and lodges and associations of a mutual benefit or benevolent character, having in mind also the necessity of the prompt payment of the insurance money in very many cases in order to provide the means of living of which the beneficiaries had been deprived by the death of the insured."

In German Alliance Ins. Co. v. Lewis, 233 U. S. 389, it is said:

"The provision of the statute is: 'That nothing in this act shall effect farmers' mutual insurance companies, organized and doing business under the laws of this State, and insuring only farm property.' The distinction is therefore between co-operative insurance companies insuring a special kind of property and all other insurance companies. It is only with that distinction that we are now concerned. There are special provisions in the statute of Kansas for the organization of co-operative companies, and if the statute under review discriminates between them the German Alliance Company cannot avail itself of the discrimination. A citation of cases is not necessary, nor for the general principle that a discrimination is valid if not arbitrary, and arbitrary in the legislative sense, that is, outside of that wide discretion which a legislature may exercise. A legislative classification may rest on narrow distinctions. Legislation is addressed to evils as they may appear, and even degrees of evil may determine its exercise. Ozan Lumber Co. v. Union County Nat. Bank, 202 U. S. 623, 50 L. Ed. 1176, 26 Sup. Ct. Rep. 768. There are certainly differences between stock companies, such as complainant is, and the mutual companies described in the bill, and a recognition of the differences we cannot say is outside of the con- [fol. 57] stitutional power of the legislature. Orient Ins. Co. v. Daggs, 172 U. S. 557, 32 L. Ed. 552, 19 Sup. Ct. Rep. 281."

In the case of Dark Tobacco Growers Co-op. Asso. et al. v. Dunn (Ky.) 266 S. W. 308, it is said:

"We are impressed with the idea that co-operative marketing of farm products is an economic necessity. It was

as a legislative body, in reviewing the action of the Corporation Commission, the duty of this court is marked out in the Constitution, and that is to determine whether or not such order appealed from was reasonable, just, and correct, supported by the prima facie presumption in favor of the action of the commission that it is reasonable and just."

[fol. 60] The Corporation Commission under the Constitution of Oklahoma in the performance of its functions exercises judicial, executive and legislative duties and when an appeal is prosecuted from that body to the Supreme Court that court in reviewing such appeal sits in the same capacity. When it has acted in such review then the aggrieved party may institute an action in any court having jurisdiction to annual such order as may be finally entered by the Supreme Court sitting in such like capacity. (See Pioneer Tel. & Tel. Co. v. State, 40 Okla. 417.)

As between a person, individual, firm or corporation engaged in ginning seed cotton commercially for profit and a co-operative organization licensed under act of 1919 engaged in the ginning of seed cotton the following distinctions as to such corporations are noted: Section 5301, Compiled Statutes 1921 provides:

"Private corporations may be formed by the voluntary association of three or more persons upon complying with the provisions of this chapter, for the following purposes, namely: Mining, manufacturing, and other industrial pursuits; * * *"

Section 5304 provides that the article of incorporation for such corporation shall set out; 1st. name of the corporation; 2nd. The purpose for which it is formed; 3rd. Place where its principal business is to be transacted; 4th term for which it is to exost; 5th number if directors; 6th amount of capital stock and number of shares, and such corporation shall have the power to create two or more classes of stock with such designations, preferences and voting powers, restrictions or qualifications thereof as shall be stated in such articles; provided, that the holder of no stock shall be prohibited from voting upon all questions pertaining to the increasing of capital stock or bonded indebtedness of the corporation. Any and all classes of preferred stock may, if desired, be made subject to re-

demption, etc. And the holder of any preferred stock shall be entitled to receive and the corporation shall be bound to pay him dividends at such rates and on such conditions and at such times as may be stated, and that after the dividends on the preferred stock have been paid then dividends may be paid on the common stock out of any remaining surplus. No amount of capital stock is required to be paid in before commencing business. (See Sec. 5316 Statutes, 1921.)

Corporations organized under the act of 1919 belong to a separate and distinct class from such ordinary private corporations ten or more persons being required to associate themselves together to form such corporation and not less than 20% of the value of the stock must be paid in before business is commenced, and no person may become a stockholder under the act of 1819 except by consent of the board of directors and not more than 5% of the stock and not more than $500.00 of the paid up stock can be owned by any one person, while in the ordinary private corporation all the stock may be owned by one person except enough to qualify for board of directors, and under the act of 1919 the voting rights of the stockholders are restricted to one vote for each stockholder, regardless of the amount of stock or interest possessed by such stockholder. In the ordinary private corporations in the same business the right to vote is determined by the amount of stock, one vote for each share of stock held by such stockholder. Under act of 1919, Sec. 5647, Article 19, Compiled Oklahoma Statutes, 1921, it is provided:

[fol. 61] "If the indebtedness of such corporation shall at any time exceed the amount of its subscribed capital stock and surplus, the directors assenting thereto shall be personally and individually liable for such excess to the creditors."

Under statutes relating to ordinary corporations no such liability is prescribed, the only liability of a stockholder is the amount of his stock. When stock is paid up no further liability exists as to a stockholder except in cases of fraud. When not paid up he would be liable to pay in his subscribed capital stock to meet the indebtedness of the concern.

Section 5649 of the act of 1919 further provides:

"If the directors of such corporation shall declare and pay any dividend or apportionment of earnings, or profits to members or non-members when the corporation is insolvent or when it would be rendered insolvent by such payment, such directors shall be jointly and severally liable for all debts of the corporation then existing and for all such debts as shall be thereafter incurred while they shall respectively continue in office. Any director may relieve himself from such liability at any time before the time fixed for the payment of such dividend or apportionment by filing a certificate in writing of his ojection with the secretary of the corporation, and with the county clerk of the county in which the principal office is located."

Section 5650 further provides:

"At the time of each dividend or apportionment of profits and at least once in every year, the directors shall cause to be prepared a statement showing the financial condition of the corporation at the end of the period to which such dividend or apportionment relates, in such form as shall fully exhibit the assets and liabilities of the corporation; its earnings and profits, purchases and sales, expenses and outlays, for the period covered by such dividend or apportionment, in such manner that a good understanding of the condition of the company, may be obtained from such statement, and shall cause such statement to be kept on file with the secretary where the same may be examined by any member of the corporation at all reasonable times."

No dividend could be declared except upon the paid up capital stock and then not in excess of 8% thereof, and 5% may be set aside for educational purposes. No member of person shall hold more than $500.00 or more than 5% of the outstanding stock. (Sec. 5642, Statutes 1921.) Sec. 5648, Paragraph 3, further provides:

"The stock of such corporation shall not be sold at less than its par value. Twenty per cent of the par value of the stock subscribed for shall be paid in before the corporation shall commence business, and the remainder of such subscriptions shall be paid from time to time upon call of the directors. No certificate of stock shall be issued

to any person until the full amount of the subscription therefor shall have been paid. No persons shall become a shareholder except by consent of the board of directors. Not more than five per cent of the stock outstanding at any time, and not more than five hundred dollars in par value, shall be held by or for one person, firm or corporation."

[fol. 62] What does "To be run co-operatively" mean "Co-operative" is defined by Mr. Webster as "One who practices co-operation; a member of co-operative society." "Co-operative agricultural or horticultural associations, instituted for mutual help, * * * may be formed * * * by any number of persons, not less than three, engaged in agriculture." Sec. 5599. Statutes 1921. "Ten or more persons may form a corporation for the purpose of conducting an agricultural * * * business upon a co-operative plan * * * * " Sec. 5637 Statutes, 1921. The word "co-operative" may not be used except by corporations organized under Article 19, Chapter 34, but associations or corporations organized under Article 16, Chapter 34, for co-operative purposes also may use a name which includes the word "co-operative" but shall have no capital stock (See Sec. 5601 paragraph A, Stats. 1921) but expenses and necessary funds are to be raised as provided in Section 5614 which is as follows:

"An association may provide for the payment of expenses, necessary in the performance of its service to its members, by the creation of a working fund or otherwise, through fees, dues, assessments, or charges for the services, to be fixed and collected in such manner as may be prescribed in the by-laws. Such fees, dues, assessments, or charges shall be limited to the amounts necessary to meet expenses already incurred, or reasonably estimated as essential to be incurred, by the association in conducting its operations. Whenever any association shall find that it has accumulated funds in excess of those necessary to meet expenses already incurred, or reasonably estimated as essential to be incurred, by it in conducting its operations it shall return such excess to, or deduct it from future fees, dues, assessments, or charges of members who contributed to such excess, in the proportions of their respective contributions."

The purpose of these two acts as contained in Chapter 34, Articles 16 and 19, is to promote co-operative action among those engaged in agricultural pursuits and matters relating and pertaining to those so engaged for mutual benefit, rather than for general commercial gain or profit. The plan under Article 19, Chapter 34, contemplates financial aid in a small way by not restricting stock membership to those engaged in agriculture, extending such opportunity to everybody until such financial need for co-operative business is met. Such plan does not contemplate unusual profits on such investment to anyone, as the total annual dividend on the paid up stock is restricted to 8%, whilst the highest legally permitted annual rate of interest in this state is 10%. Any reserve after annually setting aside not less than 10% for surplus until a fifty per cent. surplus fund is accumulated, and 5% annually for educational purposes, obviously to promote co-operative organizations among farmers, etc., and 8% dividend on paid up capital stock if it is then available, the ramainder of the net earnings are annually to be paid to its members ratably, not upon the amount of their paid up capital stock, but upon the amount of the products sold or furnished to the corporation by its members and purchased by them from it, and in this case also to the non-members upon amounts of purchases and sales from or to the corporation. A stockholder who was not a patron of the gin either by furnishing or selling to it seed cotton or buying cotton or seed from it, could never realize more than 8% annually on his investment, but has his paid up stock membership under such conditions for the purpose of promoting agriculture by furnishing a small sum of capital for farmers to install and operate their own gins in a co-operative way.

These two plans appear to be comprehensive, (1) that under Article 16 by means of which dues and assessments and other funds are to be supplied by the agricultural members of the co-operative or mutual association to finance same, and (2) that under Chapter 19 where outside finan- [fol. 63] cial assistance under the dividend restrictions heretofore noted might be obtained but in a limited way, so that no non-farmer or agriculturist could ever own more than five per cent of the outstanding paid up capital stock and not more than $500.00 of the same, and no stockholder

ever to vote more than one vote at any stockholders meeting. If the indebtedness of such corporation shall at any time exceed the amount of its subscribed stock and surplus the directors assenting thereto are made personally and individually liable for such excess to the creditors. (Sec. 5647.) Where dividends or apportionments of the earnings or profits to members or non-members are made by the directors when such corporation is insolvent, or when it would be rendered insolvent by such payment, such directors are jointly and severally liable for any debts of the corporation then existing and for all such debts as shall thereafter be incurred while they shall continue in office. (Sec. 5649 Stat. 1921.)

It was the evident purpose of the legislature in enacting these two articles to provide in a comprehensive way for co-operative organizations for the handling and marketing of crops of agriculture, that such producers should realize a reasonable value for their crops. Had the legislature confined the shareholders under Article 19 to agricultural producers, but permitted farmers not patrons of the gin to acquire, it would have probably been contended that the act on its face discriminated against other investors in that it permitted farmers who were not intended to be patrons of such co-operative organizations to furnish capital upon which they were to receive maximum dividends at the rate of 8% per annum, when persons of other classes were not eligible to so invest, and with that in mind this limited capital which was to be made available for the purpose of enabling agriculturists to organize and carry on these co-operative concerns in the promotion of agriculture was by the legislature left open to every investor whether a cotton oil corportaion or other private corporation or a firm or individual owning gins or stockholders in such enterprise. To promote, foster and encourage intelligent and orderly marketing of agricultural products through co-operative concerns, under a co-operative plan, eliminating speculation and waste and making the distributor of agricultural products between producer and consumer or manufacturer as direct as can be efficiently done these acts as contained in Chapter- 16 and 19 were passed. Courts will take judicial krowledge of conditions affecting the agricultural interests of the country. Tobacco Growers Co-Operative

Asso. v. Jones, 185 N. C. 265; Liberty Warehouse Co. v. Burley Tobacco Growers Co-Operative Asso. 271 S.W. (Ky.) 695; Minnesota Wheat Growers Co-Op-Marketing Asso. v. Huggins (Minn.) 203 NW 420. The members of the legislature from the various counties and districts of the state carried to their deliberations knowledge of such conditions in each portion thereof in considering such legislation. Congress has repeatedly legislated upon matters in which they recognized rights of the producer who might desire to manufacture or market his own product. The Federal Income Statute of 1921, Sec. 231, exempts farmers, co-operative associations, such as may be organized under Chapters 16 and 19 from income tax payment.

The ordinary commercial ginner within the state of Oklahoma may gin either as an individual, a co-partnership or a corporation, no statute, rule or provision of law restricts him in any wise in the enjoyment of full proceeds of the earnings under the rate fixed. He usually is engaged not only in ginning cotton but also in the purchase of seed cotton, cotton seed after he has ginned the cotton and frequently in the purchase of cotton for profit after it is ginned. A ginner has greater facility to purchase the seed than any one else. As he gins the cotton he catches the seed as they fall from the stand, and has the immediate means [fol. 64] for storage and housing of the same. The patron if he does not elect to sell to the ginner must receive them and haul them away, when as a rule he has no place for storage for accumulating as much as a car load so as to sell them to advantage. A great per cent. of the gins so operated are owned and controlled by cotton seed crushers operating cotton seed oil mills within the State of Oklahoma, such operation of gins not being entirely for the purpose of rendering a public service, but also for collecting cotton seed at a central point. Their gin business as ginners is incidental to that as crushers of seed to the end that they may be enabled to purchase the seed under favorable conditions. (See Choctaw Cotton Oil Co. v. Corporation Commission (Okla.) 247 Pac. 390; Planters Cotton & Ginning Co. v. West, 82 Okla. 247 Pac. 390; Planters Cotton & Ginning Co. v. West, 82 Okla. 145.

In the answer to the bill filed in this case it is alleged that complainant made an average profit on cotton gins

in which he was interested in the preceding year of as much as eighty-five per cent.

In the affidavit filed by the plaintiff in this case on preliminary hearing, which is a part of the record, he sets forth that the Choctaw Cotton Oil Company, which is a seed crushing organization, operates gins within the county of which Durant is the county seat, in the towns of Bennington, Bokchito, Caddo, Kemp and Kenefic, and that the Choctaw Gin and Choctaw Electric Gin Companies also operated at Durant. A gin organized under the act of 1919 "to be run co-operatively" does not render said proviso repugnant to the Fourteenth Amendment to the Federal Constitution.

In C. B. & Q. Railroad Co. v. Iowa, 94 U. S. 155, it is said:

"The statute divides the railroads of the state into classes, according to business, and establishes a maximum of rates for each of the classes. It operates uniformly on each class, and this is all the Constitution requires. The Supreme Court of the State, in the case of McAunich v. R. R. Co. 20 Iowa 343, in speaking of legislation as to classes, said: 'These laws are general and uniform not because they operate upon every person in the state, for they do not, but because every person who is brought within the relation and circumstances provided for is affected by the law. They are general and uniform in their operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of persons within the scope of their operation.' This Act does not grant to any railroad company privileges or immunities which, upon the same terms, do not equally belong to every other railroad company. Whenever a company comes into any class, it has all the 'privileges and immunities' that have been granted by the statute to any other company in that class. 'It is very clear that a uniform rate of charges for all railroad companies in the state might operate unjustly upon same. It was proper, therefore, to provide in some way for an adaptation of the rates to the circumstances of the different roads; and the General Assembly, in the exercise of its legislative discretion, has seen fit to do this by a

system of classification. Whether this was the best that could have been done is not for us to decide. Our province is only to determine whether it could be done at all, and under any circumstances. If it could, the legislature must decide for itself, subject to no control from us, whether the common good requires that it should be done."

In Crescent Cotton Oil Co. v. Mississippi, 257 U. S. 129 it is said:

[fol. 65 " * * * The law assailed was enacted by the state in the exercise of its police power, to prevent a practice conceived to be promotive of monopoly with its attendant evils. It is clearly settled that any classification adopted by a state in the exercise of this power which has a reasonable basis, and is therefore not arbitrary, will be sustained against an attack based upon equal protection of the laws clause of the 14th Amendment, and also that every state of facts sufficient to sustain such classification which can be reasonably conceived of as having existed when the law was enacted will be assumed. Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 55 L. Ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912-C 160, and cases cited; Rast v. Van Deman & L. Co., 240 U. S. 342, 60 L. Ed. 679, L. R. A. 1917-A 421, 38 Sup. Ct. Rep. 370, Ann. Cas. 1917-B 455. The record before us above shows that before the law assailed was enacted cotton gins had been operated in Mississippi by individuals as well as by corporations, but there is no showing that oil mills and cotton gins were both operated by an individual or by groups of individuals, and we think it may be assumed under the rule stated, that because of the larger capital required, and perhaps for other reasons, oil mills and cotton gins may have been operated in that state only by corporations, and that for this reason the restraint of the evil aimed at by the act of the legislature could be accomplished by controlling corporations only. Assuming this to be the fact when the law was enacted obviously the classsification objected to cannot be pronounced so without reasonable basis as to be arbitrary."

In Middleton v. Texas Power & Light Co., 249 U. S. 152, it is said:

"There is a strong presumption that a legislature understands and correctly appreciates the needs of its own

people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds. The equal protection clause does not require that state laws shall cover the entire field of proper legislation in a single enactment. If one entertained the view that the act might as well have been extended to other classes of employment, this would not amount to a constitutional objection. Rosenthal v. New York, 326 U. S. 260, 271, 57 L. Ed. 212, 217, 33 Sup. Ct. Rep. 27, Ann. Cas. 1914-B 71; Patsone v. Pennsylvania, 232 U. S. 138, 144, 58 L. Ed. 539, 543, 34 Sup. Ct. Rep. 281; Missouri K. & T. R. Co. v. Cade, 233 U. S. 642, 649, 650, 58 L. Ed. 1135, 1138, 34 Sup. Ct. Rep. 678; International Harvester Co. v. Missouri 234 U. S. 199, 215 58 L. Ed. 1276, 1283, 53 L. R. A. (N. S.) 525, 34 Sup. Ct. Rep. 859; Kookee Consol. Coke Co. v. Taylor, 234 U. S. 224, 227, 58 L. Ed. 1288, 34 Sup. Ct. Rep. 856; Miller v. Wilson, 236 U. S. 373, 384, 59 L. Ed. 628, 632, L. R. A. 1915-F 829, 35 Sup. Ct. Rep. 342. The burden being upon him who attacks a law for unconstitutionality, the courts need not be igenious in searching for grounds of distinction to sustain a classification that may be subjected to criticism."

In Chicago, Rock Island & Pacific Railway Co. v. D. J. Perry, 259 U. S. 548, it is said:

"We are not advised of the precise reasons why the legislature cho-s*t* to put the policy of this statute into effect as to public service corporation, without going further; [fol. 66] nor is it worth while to inquire. It may have been that the public had a greater interest in the personnel of the public service corporations, or that the legislature deemed it expedient to begin with them as an experiment—or any one of a number of other reasons. It was peculiarly a matter for the legislature to decide, and not the least substantial ground is present for believing they acted arbitrarily. We feel safe in relying upon the general presumption that they knew what they were about. Middleton v. Texas Power & Light Co., 249 U. S. 152."

In Omaechevarri v. Idaho, 246 U. S. 343, it is said:

"We cannot say that the measure adopted by the state is unreasonable or arbitrary. It was found that conflicts between cattle rangers and sheep herders on the public

domain could be reconciled only by segregation. In national forests, where the use of land is regulated by the Federal Government, the plan of segregation is widely adopted. And it is not an arbitrary discrimination to give preference to cattle owners in prior occupancy without providing for a like preference to sheep owners in prior occupancy. For experience shows that sheep do not require protection against encroachment by cattle, and that cattle rangers are not likely to encroach upon ranges previously occupied by sheep herders. The propriety of treating sheep differently than cattle has been generally recognized."

The gin is to be operated co-operatively and is thereby placed in a classification by the legislature of the state. We do not reach a conclusion that such a classification is so unreasonable that it should be judicially annulled. If it is organized under the statute making that classification, and is so operated the fact that others besides growers and producers are permitted to become incorporators, does not operate to render the classification violative of the Fourteenth Amendment. They are limited as to amount of stock and voting participation and as to profits. The idea of the law and the trend of contemporary thought of law givers and expressions of courts alike is to encourage co-operative dealing in the products of agriculture. The complainant rests his case under the contention of a violation of the Federal Constitutional provision guaranteeing equal protection of the law, which seems to be without substantial merit. As to whether the complainant operates his gin under a franchise or license that is not essential to determine. In Oklahoma perpetual and exclusive franchises are prohibited. Oklahoma Constitution Article 2 Sec. 32; Article 5, Section 51, and Article 18, Section 7. In Boise City Artesian Hot & Cold Water Co. v. Boise City (9th CCA.) 123 Fed. 252, it is held that an ordinance granting right to lay and repair water pipes in the streets and alleys of the city, but without fixing any term for the privilege, is a grant of a license only, revocable at the will of the city, since it had no power to grant a perpetual franchise, and that appears to be the rule supported by the weight of authority. It is assumed that complainant may maintain this action under such status if the proviso assailed by him

is void, but conclude that he did not have such a vested right as to prevent the passage of said proviso if it does not amount to an arbitrary or unreasonable classification.

[fol. 67] That the question has become moot is untenable as the Durant Co-operative Gin Company is a party to this action. Complainant's bill should be dismissed.

Van Valkenburgh, Circuit Judge, concurs in the foregoing opinion, which is made the opinion of the Court.

Cotteral, District Judge, concurs in conclusion reached.

[File endorsement omitted.]

[fol. 68] IN UNITED STATES DISTRICT COURT

[Title omitted]

FINAL DECREE—Filed Dec. 12, 1927

The above entitled cause having been heard and argued by counsel and submitted, on consideration of the pleadings, evidence and arguments, it is this day by the Court

Ordered, adjudged and decreed, that the plaintiff's bill should be and it is accordingly dismissed, and that the costs of this suit be taxed to the plaintiff; to all of which the plaintiff by his counsel at the time duly excepts.

December 12, 1927.

Arba S. Van Valkenburgh, U. S. Circuit Judge. John H. Cotteral, U. S. District Judge. Robert L. Williams, U. S. District Judge.

[File endorsement omitted.]

[fol. 69] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed Jan. 17, 1928

To the Honorable John H. Cotteral, United States District Judge for the Western District of Oklahoma:

The above named complainant, W. A. Frost, doing business under the name of the Mitchell Gin Company, feeling

aggrieved by the decree rendered and entered in the above entitled cause, on the 19th day of December, 1927, does hereby appeal from the said decree to the Supreme Court of the United States for the reasons set forth in the assignment of errors filed herewith, and he prays that said appeal be allowed and that citation be issued as provided by law and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States sitting at the City of Washington in the District of Columbia, as under the rules in such cases made and provided, and that the Court make all proper orders.

R. M. Rainey, S. B. Flynn, Attorneys for Complainant.

[File endorsement omitted.]

[fol. 70] In United States District Court

[Title omitted]

Assignments of Error—Filed Jan. 17, 1928

Comes now Complainant in the above entitled cause and files the following assignment of errors upon which he will rely in his appeal in said cause from the decree rendered by this Honorable Court on the 12th day of December, 1927:

I

The District Court of the United States for the Western District of Oklahoma erred in holding Section 3714, Compiled Laws of Oklahoma of 1921, as amended by Chapter 109 of the Session Laws of 1925, constitutional, and that the aforementioned amendment, containing the following provision:

"That on the presentation of a petition for the establishment of a gin to be run cooperatively, signed by one hundred citizens and taxpayers of the community where the gin is to be located, the Corporation Commission shall issue a license for said gin,"

is constitutional, and that the said proviso does not deprive this Complainant of his property without due process of law and does not deny to this Complainant equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

[fol. 71] Wherefore, Complainant prays that said final decree be reversed and that the said District Court of the United States for the Western District of Oklahoma be ordered to enter a decree setting aside its said order and granting to this Complainant a permanent injunction, as prayed for, together with all other, further and suitable relief.

R. M. Rainey, S. B. Flynn, Attorneys for Complainant.

[File endorsement omitted.]

[fol. 72] In United States District Court

[Title omitted]

Order Allowing Appeal—Filed Jan. 17, 1928

On motion and petition of Complainant, it is hereby ordered that an appeal to the Supreme Court of the United States, from the final decree heretofore filed and entered herein on the 12th day of December, 1927, be and the same is hereby allowed and that the bond on appeal be fixed in the sum of One Thousand ($1,000.00) Dollars.

Done at Oklahoma City, State of Oklahoma, this 17th day of January, 1928.

John H. Cotteral, District Judge.

[File endorsement omitted.]

[fols. 73-77] Bond on appeal for $1,000.00, approved and filed January 17, 1928, omitted in printing.

fols. 78 & 79 IN UNITED STATES DISTRICT COURT

[Titled omitted]

STIPULATION RE TRANSCRIPT OF RECORD—Filed January 19, 1928

You are hereby requested to prepare transcript of the record in the above cause to be filed in the Supreme Court of the United States, said record to be printed accordance with the rules of said Court and the respective parties hereby stipulates that the transcript shall include the following portions of the record:

1. Citation and Service.
2. Bill of Complaint.
3. Motion to Dismiss and Answer.
4. Agreed Statement of Facts.
5. Opinion.
6. Decree.
7. Petition for Appeal.
8. Order Allowing Appeal.
9. Citation and Service.
10. Assignment of Errors.
11. Bond on Appeal.
12. Stipulation for Transcript of Record on Appeal.

Rainsey, Fynn, Green & Anderson, Attorneys for Complainant. Edwin Dabney, Attorney General, State of Oklahoma. E. S. Ratliff, Attorney for Corporation Commission, Its Members, and Durant Cooperative Gin Company.

[File endorsement omitted.]

[fol. 80] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND STIPULATION AS TO PARTS OF RECORD TO BE PRINTED—Filed February 3, 1928

In accordance with Rule eleven of this honorable court appellant hereby specifies the following as points upon which he will rely for a reversal of the judgment of the

United States District Court for the Western District of Oklahoma:

I

The said United States District Court for the Western District of Oklahoma committed error in holding Section 3714 of Compiled Laws of Oklahoma of 1921, as amended by Chapter 109 of the Session Laws of Oklahoma of 1925, constitutional by dismissing appellant's bill. Appellant contends that said Act as amended creates and authorizes an arbitrary and unreasonable classification of persons engaged in the business of ginning seed cotton in the State of Oklahoma, and that the amendment to said Act, in relieving co-operatively-run gins from the statutory requirement of securing a permit upon the presentation of a petition signed by one hundred citizens and taxpayers of the community where the gin is to be located, discriminates [fols. 81 & 82] against appellant and deprives him of his property without due process of law and denies to him the equal protection of the law as guarantted by the Fourteenth Amendment to the Constitution of the United States.

In support of the foregoing points appellant hereby designates the following parts of the record to be printed, which he thinks necessary for a proper determination of this appeal, and hereby requests the Clerk of this Honorable Court to have the same printed under his supervision:

1. Citation and Service.
2. Bill of Complaint.
3. Motion to Dismiss and Answer.
4. Opinion of United States District Court.
5. Final decree.
6. Petition for Appeal.
7. Order allowing appeal.
8. Citation and service.
9. Assignment of Errors.
10. Bond of appeal.
11. Stipulation for transcript of record and service.
12. Statement of points to be relied upon.

R. M. Rainey, Streter B. Fynn, Attorneys for Appellant.

The undersigned, Counsel for Appellees, hereby acknowledge service of Appellant's specifications of points upon

which he will rely in the Supreme Court and the designation of portions of the record to be printed, and accepts said designation of portions of record to be printed as calling for the proper record in this case.

Dated this 31 day of January, 1928.

Edwin Dabney, by V. I. Crowe, Attorney General of the State of Oklahoma. E. S. Ratliff, Counsel for Corporation Commission of the State of Oklahoma, Durant Co-operative Gin Co., et al.

[fol. 83] [File endorsement omitted.]

Endorsed on cover: File No. 33,192. W. Oklahoma D. C. U. S. Term No. 740. W. A. Frost, doing business under the name of Mitchell Gin Company, appellant, vs. Corporation Commisison of the State of Oklahoma, Fred Capshaw, Frank Carter, et al., etc., et al. Filed Feb. 3d, 1928. File No. 33,192.

FILE COPY

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CHARLES ELMORE CROPLEY
CLERK

No. ~~740~~ 60

Supreme Court of the United States

October Term 1927

22

W. A. FROST, DOING BUSINESS UNDER THE NAME OF MITCHELL GIN COMPANY, APPELLANT,

vs.

CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, FRED CAPSHAW, FRANK CARTER, ET AL., ETC., ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

MOTION TO ADVANCE

EDWIN DABNEY,
Attorney General of the State of Oklahoma,

E. S. RATLIFF,
Attorney for the Corporation Commission of the State of Oklahoma,

R. M. RAINEY,
STREETER B. FLYNN,
Attorneys for Appellant.

Francis & Holden, Brief Printers, 522-5 West Second St., Oklahoma City. Maple 6245

No. 740

Supreme Court of the United States

October Term 1927

W. A. FROST, DOING BUSINESS UNDER THE NAME OF MITCHELL GIN COMPANY, APPELLANT,

vs.

CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, FRED CAPSHAW, FRANK CARTER, ET AL., ETC., ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

MOTION TO ADVANCE

Come now appellees, appearing by Edwin Dabney, Attorney General of the State of Oklahoma, and E. S. Ratliff, attorney for the Corporation Commission of the State of Oklahoma, and appellant appearing by Robert M. Rainey and Streeter B. Flynn, and respectfully move this Honorable Court to advance this cause and set the same for hearing at a date as early as may be convenient for the Court.

In the support of this motion the parties respectfully

state that this is the second appeal in this case to this Court. That the first appeal filed May 14, 1926, No. 375 October term 1926, was advanced for hearing by this Honorable Court, and the decree of the three judge court, convened pursuant to Section 366, Jurisdiction Code, was affirmed on authority of *Chicago, G. W. Ry. Co.* v. *Kendall et al.*, 266 U. S. 94.

That thereafter final hearing was had, and on December 13, 1927, the Court, composed of three judges, entered its decree dismissing appellant's bill.

The case involves the question of the constitutionality of the statutes of the State of Oklahoma dealing with the licensing of cotton gins. That under said statutes certificates of convenience and necessity must be secured before a person or corporation can erect or operate a gin, and said license or permit can be secured only after a hearing before the Corporation Commission.

The Legislature of the State of Oklahoma, in 1925, amended the former statutes by inserting the following provision:

> "That on the presentation of a petition for the establishment of a gin to be run co-operatively, signed by one hundred citizens and tax payers of the community where the gin is to be located, the corporation commission shall issue a license for said gin."

Appellant is and was the holder of a valid license to

operate a gin in the City of Durant, Oklahoma. Appellee, Durant Co-operative Gin Company, applied to the commission for a permit or license and attached thereto a petition signed by one hundred citizens and tax payers. To restrain the issuance of said license by the Corporation Commission, appellant filed his bill in the United States District Court for the Western District of Oklahoma, contending that the proviso exempting the Durant Co-operative Gin Company from making a showing of the necessity for the establishment of another gin in the city of Durant by the filing of a petition signed by one hundred citizens and tax payers of the community, is in violation of and contrary to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and that the granting of a license or permit to the Durant Co-operative Gin Company pursuant to said proviso, would deprive appellant of his constitutional guarantees.

The question involved is of great importance to the State of Oklahoma, since the business of raising and ginning cotton is the principal agricultural industry of the State, and that until the constitutionality of the proviso in question is determined, great confusion will continue to exist in the cotton ginning business in the State.

For the reasons herein mentioned parties respectfully move this Honorable Court for the advancement of this

cause and the setting of the same at a date as early as may be convenient to the court, and respondents furthermore respectfully state that the matter is of such importance, that if the business of the court will permit, they would ask that the advancement be to some date prior to the adjournment of the present term.

Respectfully submitted,

EDWIN DABNEY,
Attorney General of the State of Oklahoma,

E. S. RATLIFF,
Attorney for the Corporation Commission of the State of Oklahoma,

R. M. RAINEY,
STREETER B. FLYNN,
Attorneys for Appellant.

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NO. [redacted] 60

23

In the Supreme Court of the United States

OCTOBER TERM 1927

W. A. FROST, Doing Business Under the Name of MITCHELL GIN COMPANY,
Appellant,

vs.

CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, FRED CAPSHAW, FRANK CARTER ET AL., ETC., ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

BRIEF OF APPELLANT.

ROBT. M. RAINEY,
STREETER B. FLYNN,
Attorneys for Appellants.

RAINEY, FLYNN, GREEN & ANDERSON,
CALVIN JONES,
Of Counsel.

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NO. 740

In the Supreme Court of the United States

OCTOBER TERM 1927

W. A. FROST, Doing Business Under the Name of MITCHELL GIN COMPANY,
Appellant,

vs.

CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, FRED CAPSHAW, FRANK CARTER ET AL., ETC., ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

BRIEF OF APPELLANT.

Jurisdiction.

This suit was instituted in the United States District Court for the Western District of Oklahoma by the filing of a bill in which both an interlocutory and permanent injunction were prayed against the Corporation Commission of the State of Oklahoma, its members and the Durant Co-Operative Gin Company.

The jurisdiction of the district court was invoked on the ground that the announced intention of the Commission to issue a license in favor of the Durant Co-Operative Gin Company authorizing it to construct, maintain and operate a cotton gin was in violation of rights vested in appellant under the Fourteenth Amendment to the Constitution of the United States, and particularly that portion thereof guaranteeing due process of law and the equal protection of the laws.

A court of three judges convened pursuant to Section 266 of the Judicial Code, denied the temporary injunction, and appellant prosecuted an appeal to this Court (No. 375, October Term, 1926), which affirmed the action of the District Court on authority of *Chicago G. W. R. Co.* v. *Kendall et al.*, 266 U. S. 94, 100. The final hearing was thereafter had before a court of three judges and on December 13, 1927 a decree was entered dismissing appellant's bill. From such action this appeal is prosecuted, and a review by this Court is proper. Judicial Code, Sec. 266; *Smith* v. *Wilson*, 273 U. S. 388; *Clark* v. *Poor*, 274 U. S. 554; *Interstate Buses Corp.* v. *Blodgett et al.*, opinion filed February 20, 1928 (not yet reported); *Gulf Fisheries Co.* v. *D. B. MacIverney, County Attorney*, filed February 20, 1928 (not yet reported).

Question Presented.

Appellant W. A. Frost, an individual, doing business under the firm name of Mitchell Gin Company is engaged in the business of operating a cotton gin in the City of Durant, Oklahoma (R. 65). Cotton gins in the State of Oklahoma are public utilities and the business of ginning seed cotton has been declared a public business. Under the statutes of the State, before anyone may engage in such business it is necessary to secure a license from the Corporation Commission of the State, and such license is granted only upon a showing that the construction of a gin is a needed utility, and that the applicant is a competent and desirable corporation or person to engage in the business.

The Act contains an exception, however, to the effect that permits shall be granted to gins which are to be run co-operatively upon presentation by the applicant of a petition signed by one hundred citizens and taxpayers of the community in which the proposed gin is to be located.

Appellant is the holder of a valid license from the Corporation Commission, and is engaged in the business of ginning cotton (R. 65). In order to protect his property he instituted this action seeking to enjoin the issuance of a license to the Durant Co-Operative Gin Company, which had filed its application with the Corporation Commission and had presented the requisite petition containing the names of one hundred citizens and taxpayers (R. 72).

The question presented is whether said proviso exempting those desiring to establish and operate a gin to be run co-operatively from proving that said gin is a needed utility conflicts with the equal protection and due process clauses of the Fourteenth Amendment. The Corporation Commission ruled that the proviso was mandatory, and that it would grant the license or permit without inquiring into the question of the necessity for an additional gin in the vicinity of Durant, and without regard to the competency and reliability of the co-operative applicant.

The district court, by dismissing the bill, in effect, held the classification non-discrimnatory, and the Act constitutional.

Statement.

The case was submitted upon an agreed statement of facts (R. 64) which may be briefly summarized as follows: Appellant W. A. Frost, an individual, is engaged in the cotton ginning business and owns a gin in the City of Durant, Oklahoma, which is operated under and by virtue of a license duly issued by the Corporation Commission (R. 65) as provided by Article 40, chapter 7, Sec. 3714, C. O. S. 1921, as amended by chapter 191, Session Laws of Oklahoma, 1923 and by Chapter 109, Session Laws of Oklahoma 1925 (see appendix.)

Fred Capshaw, Frank Carter and C. C. Childers are

the duly elected, qualified and acting members of the Corporation Commission and Edwin Dabney is the Attorney General of the State of Oklahoma. The amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000 (R. 65).

It is further stipulated that the Durant Co-Operative Gin Company in 1926 filed with the Corporation Commission its application for permission to establish a cotton gin at Durant, and that appellant protested in writing against the issuance of such license or permit. A hearing was thereafter had before the Corporation Commission on April 3, and 14, 1926 (R. 68) at which appellant objected to the introduction of any evidence on the ground that Sec. 3714, C. O. S., 1921, as amended in 1925, which in part provides that:

> "On the presentation of a petition for the establishment of a gin to be run co-operatively, signed by 100 citizens and taxpayers of the community where the gin is to be located, the Corporation Commission shall issue a license for said gin."

is unconstitutional for the reason that it is discriminatory, arbitrary and denies appellant due process of law and the equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States (R. 69).

After overruling appellant's objection the Articles of Incorporation of the Durant Co-operative Gin Company were introduced and also the application with the requisite

number of signatures. Appellant was denied the right to introduce evidence in support of his protest and was refused permission to cross-examine the applicant's witnesses except on the question of whether or not it had complied with the law. In sustaining the objection to the scope of the cross-examination and to the introduction of any evidence, by appellant, the Commission through its chairman said (R. 72):

> "Chairman Capshaw: And the Commission is going to refuse to permit any evidence on behalf of the protestant in regard to the necessity or for the purpose of showing there is no necessity for any additional gins at this point on the theory that under the law passed by the 1925 Legislature, it is mandatory to grant these permits whether there is any necessity or not.
>
> "Mr. Rainey: Exception.
>
> "Chairman Capshaw: The Commission announces that the permit applied for in this cause will be issued by the Commission after a conference of the full Commission and within the next few days. That permit will be held up pending the conference of the full Commission but will not be held up to exceed a few days."

At the conclusion of the hearing before Hon. Arba Van Valkenburg, Circuit Judge, Hon. Robert L. Williams and Hon. John H. Cotteral, District Judges, appellant's bill was dismissed (R. 58) and an opinion prepared by Judge Williams was filed (R. 29).

Opinion of the Court.

The opinion (R. 29) after setting forth the contents of the complaint, answer and agreed statement of facts, states:

> "The sole objection made before the State Corporation Commission to the issuance of the license or permit was on the ground that the Act under which it was sought was unconstitutional as violating the Federal Constitution, and that is the ground under which a writ of injunction is here sought" (R. 38).

The Court then discusses the two acts under which co-operative organizations may be formed, and states that the act in question with its proviso is valid as to gins organized under the co-operative act set forth in Article 16, chapter 34, C. O. S., 1921, Sections 5598-5621 inclusive, and amendments thereto (R. 40). Appellee gin company was organized, however, under Article 19, chapter 34, C. O. S., 1921, Sections 5637-5652 inclusive, referred to as the 1919 Act.

The opinion then continues, and concludes that the Act is not unconstitutional regardless under which co-operative act the applicant was organized, since the methods or organization of co-operative corporations and their powers under the 1919 Act were sufficient to justify a classification which would permit treatment different from that accorded to individuals, partnerships and corporations desiring to operate gins in the State (R. 57). The court in passing on this question assumed that complainant had a sufficient property

interest in the permit or license granted by the Commission to invoke the protection of the Fourteenth Amendment (R. 57-58).

Summary of Argument.

Cotton gins in the State of Oklahoma are public utilities, and the business of ginning seed cotton is a public business.

Sec. 3712, C. O. S. 1921.

No gin can be maintained or operated without a license from the State Corporation Commission.

Sec. 3713, C. O. S. 1921.

Licenses are granted after a hearing in the event the applicant proves the establishment of the proposed gin necessary. Such a showing must be made by everyone except an applicant who desires to operate a gin to be run co-operatively, in such a case the applicant need not show necessity, if he merely presents a petition signed by 100 citizens and taxpayers residing in the locality where the proposed gin is to be located.

Sec. 3714, C. O. S. 1921.

Appellant contends such excepting proviso is discriminatory, deprives him of due process of law and of the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States.

I.

Appellant's right to maintain and operate a gin is a franchise or a property right in the nature of a franchise.

The grant of the right to operate a gin can be secured from the sovereign alone. It is essential, and permits the holder to engage in a business which he could not without the grant.

—*McPhee et al.* v. *Union Pacific Railway*, 158 Fed. 5, 10.

New Orleans Gas Co. v. *Louisiana Light Co.*, 115 U. S. 650, 659, 6 Sup. Ct. 252, 29 L. ed. 516.

Walla Walla v. *Walla Walla Water Co.*, 172 U. S. 1, 9, 19 Sup. Ct. 77, 43 L. ed. 341.

Denver v. *City Cable Co.*, 22 Colo. 565, 45 Pac. 439.

Donahue v. *Morgan*, 24 Colo. 389, 390, 400, 50 Pac. 1038.

Thomas v. *Grand Junction*, 13 Colo. App. 80, 81, 65 Pac. 665.

City of Denver v. *Denver Union Water Co.*, (Colo.) 91 Pac. 918, 919.

Morgan v. *Lee*, 93 U. S. 217, 213.

California v. *Pacific R. R. Co.*, 127 U. S. 1, 40.

Owensboro v. *Cumberland T. & T. Co.*, 230 U. S. 58, 65.

Trustee, etc. of South Hampton v. *Jessup*, 56 N. E. 538.

State v. *Country Club*, 173 S. W. 570.

The right granted is to engage in a public business and

to collect for the service rendered, such tolls as may be fixed by the sovereign.

—*Charles River Bridge Co.* v. *Warren Bridge et al.*, 11 Peters 420.

Monongahela Navigation Co. v. *U. S.*, 148 U. S. 312, 328, 329.

The expenditure of a considerable sum of money for the erection of a gin plant was contemplated at the time of the grant to appellant. The presumption in such instances is that the grant is of a more substantial character than a mere license.

—*Boise City* v. *Boise Artesian Hot & Cold Water Co.*, 230 U. S. 84, 90.

Owensboro v. *Telephone & Telegraph Co.*, 230 U. S. 53, 64, 65 and 66.

Perpetuity and exclusiveness are not essential characteristics of a franchise.

—*Boise City* v. *Boise Artesian Hot & Cold Water Co.*, 230 U. S. 84, 90.

Charles River Bridge Co. v. *Warren Bridge et al.*, 11 Peters 420.

Long Island Water Supply Co., v. *Brooklyn*, 166 U. S. 685, 689.

Beinville Water Supply Co. v. *Mobile*, 186 U. S. 212, 217, 218, 223.

Old Colony Trust Co. v. *Omaha*, 230 U. S. 100, 115.

The fact that the right granted may be subject to the

constitutional and statutory powers of the State as well as to the police powers will not prevent it from being a franchise.

—*Bienville Water Supply Co.* v. *Mobile*, 186 U. S. 212, 217, 218, 223.

Long Island Water Supply Co. v. *Brooklyn*, 166 U. S. 685, 689.

Owensboro v. *Cumberland Telephone Co.*, 230 U. S. 58, 65.

II.

The right held by appellant to operate a gin will be protected by a court of equity.

Franchises and rights in the nature of a franchise have from the earliest times been protected by courts of equity.

—*Owensboro* v. *Cumberland Telephone Co.*, 230 U. S. 58, 65.

Boise City v. *Boise City, etc., Water Co.*, 230 U. S. 84.

Such rights are recognized as property and scrupulously guarded.

—*Charles River Bridge Co.* v. *Warren Bridge Co.*, 11 Peters 420.

The interference with the collection of tolls constitutes a taking of property.

—*Charles River Bridge Co.* v. *Warren Bridge Co.*, 11 Peters 420.

The right for which protection is sought need not be

exclusive in the sense that other valid grants may not be made. Such a grant is exclusive, however, insofar as all are concerned to whom a valid grant has not been made.

—*Bartlesville Electric Light & Power Co.* v. *Bartlesville Interurban Ry. Co.*, 26 Okla. 453, 29 L. R. A. (N. S.) 77.

Tulsa Street Ry. Co. v. *Oklahoma Union Traction Co.*, 27 Okla. 339, 342, 343.

Henry v. *Bartlesville Gas & Oil Co.*, 33 Okla. 473, 478.

Melville Gas Light Co. v. *Vineland Light & Power Co.*, 72 N. J. Eq. 305.

Peoples Transit Co., v. *Henshaw*, 20 Fed. (2nd) 87.

Pomeroy's Equity Jurisprudence, Vol. 5, Sec. 2016, 2017.

III.

Appellant is denied due process of law and equal protection of the laws.

The act in question makes an unauthorized arbitrary and discriminatory classification of persons engaged in the same business, and lays greater burdens on some that are borne by others. The Fourteenth Amendment affords protection in such instances:

—*Ex parte Virginia*, 100 U. S. 339.

Barbier v. *Connoly*, 113 U. S. 27, 31.

Truax v. *Corrigan*, 257 U. S. 33.

Soon Hing v. *Crowley*, 113 U. S. 703, 709.

Yick Woo v. *Hopkins*, 118 U. S. 356, 369.

Hayes v. *Missouri*, 120 U. S. 68.

G. C. & S. F. v. *Ellis*, 165 U. S. 150, 154.

Cotting v. *K. C. Stock Yards et al.*, 183 U. S. 79.

Connolly v. *Union Sewer Pipe Co.*, 184 U. S. 540.

Southern Ry. v. *Green*, 216 U. S. 400.

A., T. & S. F. v. *Vosburg*, 238 U. S. 56.

Truax v. *Raich*, 239 U. S. 33.

Power Mfg. v. *Saunders*, 274 U. S. 490.

Quaker City Cab Co. v. *Pa.* (not yet reported; filed May 28, 1928).

The amendment does not prevent proper classification.

Southern Ry. Co. v. *Greene*, 216 U. S. 417.

The reasonableness of the classification is always open to judicial review.

G. C. & S. F. Ry. Co. v. *Ellis*, 165 U. S. 150.

While no general rules can be formulated which will apply to every case, cases dealing with very similar questions are persuasive.

—*Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

Liberty Warehouse Co., v. *Burley Tobacco Growers Co-op. Market Assn.* (not yet reported; opinion filed Feb. 20, 1928).

The challenged classification rests on ownership.

—*Quaker City Cab Co.* v. *Pa.* (not yet reported; filed May 28, 1928).

State v. *Nashville C. & S. L. Ry. Co.*, 124 Tenn. 1.

After the State has declared as provided by statute that gins should be licensed only in localities where they are necessary to handle the crop, and has recognized that the unrestrained erection and duplications of facilities in a regulated business is economically unsound and against the public policy of the State, an attempt to favoring certain groups under the guise of classification will be restrained.

—*Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

Liberty Warehouse v. *Burley Tobacco Growers Co-op. Market Ass'n* (not yet reported; opinion filed Feb. 20, 1928).

IV.

The proviso is separable from the remainder of the Act.

—*Leob* v. *Twp. Trustees*, 179 U. S. 472, 490,

Connolly v. *Union Sewer Pipe Co.*, 184 U. S. 540.

Truax v. *Corrigan*, 257 U. S. 312, 341, 342.

Section 3718, C. O. S., 1921.

Berea College v. *Ky.*, 211 U. S. 45, 54, 55.

Errors Assigned.

To present the questions involved the following assignments of error were made (R. 59):

The District Court of the United States for the Western District of Oklahoma erred in holding Sec. 3714, Compiled Laws of Oklahoma, as amended by chap. 109 of the Session

Laws of 1925, constitutional, and that the aforementioned amendment, containing the following provision:

> "That on the presentation of a petition for the establishment of a gin to be run co-operatively, signed by one hundred citizens and taxpayers of the community where the gin is to be located the Corporation Commission shall issue a license for said gin."

is constitutional, and that the said proviso does not deprive this complainant of his property without due process of law and does not deny to this complainant equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT AND BRIEF.

The Oklahoma Legislature in 1916 declared cotton gins public utilities and the operation of the same for the purpose of ginning seed cotton a public business (Sec. 3712, C. O. S., 1921. See appendix).

Section 3713, C. O. S., 1921, as amended by Chapter 191, Session Laws, 1923, (see appendix) provides that no one shall be permitted to maintain or operate a gin for the purpose of ginning seed cotton without first having procured from the Corporation Commission a license and paid the prescribed fees.

Section 3714, C. O. S., 1921 (see appendix) was amended

by the Legislature in 1923, chap. 191, Session Laws 1923, and later again amended in 1925, chap. 109, Session Laws 1925. As last amended it provides that the Corporation Commission, in issuing a license, shall have the right to take into consideration the necessity for the operation of a gin at the desired place, provided that nothing in the Act shall operate to prevent the licensing of gins already established except for violation of the Commission's rules and regulations, and furthermore that no new gin shall be constructed, installed or licensed or any old gin removed from one place to another until satisfactory showing shall have been made to the Commission setting forth that such gin is a needed utility and that the proposed corporation, company, firm or individual is competent, and that it is a desirable corporation, company, firm or individual, to establish and operate said gin as may appear in the discretion of the Commission.

The following proviso then appears:

> "*Provided,* that on the presentation of a petition for the establishment of a gin to be run co-operatively, signed by 100 citizens and taxpayers of the community where the gin is to be located, the Corporation Commission shall issue a license for said gin."

The original Act, Section 3714, C. O. S. 1921, as amended by the Legislature in 1923 (see appendix) was substantially the same as the present Act, except for the above proviso.

Under the 1923 Act it was incumbent upon *all applicants* to make a satisfactory showing to the Commission that the gin sought to be licensed was a needed utility.

Appellant contends that the present Act, chapter 109, Session Laws 1925, exempting co-operatively operated gins organized under the 1919 Act (Art. 19, chap. 34), from the burden of showing the necessity for an additional gin in the locality is discriminatory, arbitrary and deprives him of due process and of the equal protection of the laws in contravention to the Fourteenth Amendment of the Constitution of the United States.

I.

Appellant's right to maintain and operate a gin is a franchise or a property right in the nature of a franchise.

Section 3712, C. O. S., 1921 (see appendix), declares cotton gins to be public utilities and the operation of the same to be a public business.

Section 3713, C. O. S. 1921, as amended (see appendix) provides that no gin shall be maintained or operated until a license or permit has been secured from the Corporation Commission.

Section 3714, C. O. S., 1921, as amended by Sec. 1, chap. 109, page 147, Session Laws 1925, provides that licenses shall be issued in the event the Commission determines after a hearing that the proposed gin is a needed utility

and that the applicant is a competent and desirable person or corporation to operate a gin. The Commission is given the same power over gins in regard to the regulation of rates, service, etc., as it is over other public utilities in the State (Sec. 3715, C. O. S., 1921, as amended. Sec. 3, chap. 191, Session Laws 1923. See appendix).

The right granted to maintain and operate a gin we contend is a franchise or a property right in the nature of a franchise as distinguished from a mere license and as such is entitled to protection just as any other property or property right. The exact line of demarcation between a license and a franchise, as Judge Sanborn says in the case of *McPhee et al.* v. *Union Pacific Railway Company,* 158 Fed. 510, may not always be clearly drawn. In his opinion the salient features of a franschise are given as follows:

> "A franchise is a right or privilege granted by the sovereignty to one or more parties to do some act or acts which they could not perform without this grant from the sovereign power. *Bank of Augusta* v. *Earle,* 13 Pet. 595, 10 L. ed. 274; *D. & S. Ry. Co.,* v. *Denver City Ry. Co.,* 2 Colo. 673, 682.
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> * * * * * * * * * * *
>
> "A right or privilege which is essential to the performance of the general function or purpose of the grantee, and which is and can be granted by the sovereignty alone, such as the right or privilege of a corporation to operate an ordinary or commercial railroad, a street railroad, city waterworks or gasworks, and to collect tolls therefor, is a franchise. *New Orleans Gas Co.* v. *Louisiana Light Co.,* 115 U. S. 650, 659, 6 Sup.

Ct. 252, 29 L. ed. 516; *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 9, 19 Sup. Ct. 77, 43 L. ed. 341; *Denver* v. *City Cable Co.*, 22 Colo. 565, 45 Pac. 439; *Donahue* v. *Morgan*, 24 Colo. 389, 390, 400, 50 Pac. 1038; *Thomas* v. *Grand Junction*, 13 Colo. App. 80, 81, 65 Pac. 665; *City of Denver* v. *Denver Union Water Co.* (Colo.), 91 Pac. 918, 919."

See, also:

—*Morgan* v. *Lee*, 93 U. S. 217, 213.

California v. *Pacific Railroad Co.*, 127 U. S. 1, 40.

Owensboro v. *Cumberland T. & T. Co.*, 230 U. S. 58, 65.

Trustee, etc., of South Hampton v. *Jessup*, 56 N. E. 538.

State v. *Country Club*, 173 S. W. 570.

It is quite clear that the right held by appellant to maintain and operate a gin is a right granted by the sovereignty to perform a public service which he could not perform without the grant. He has a right to conduct a public business and to collect for the services performed such rates as may be fixed by the sovereignty. The right granted is neither personal nor temporary and if exercised necessitates the expenditure by the grantee of a large sum of money in the erection of a gin plant.

As was said in the case of *Boise City* v. *Boise Artesian Hot & Cold Water Co.*, 230 U. S. 84, 90, the presumption is that where the expenditure of a considerable sum of money is contemplated under the right granted that it is

more substantial than a mere revocable license. The right to operate a gin is of great value and in fact without the grant the gin plant would be valueless except as junk.

—*Owensboro* v. *Telephone & Telegraph Co.*, 230 U. S. 53, 64, 65 and 66.

The State, in effect, under the gin act has granted two rights which we will hereafter refer to as the franchise:

First. The right to maintain a gin.

Second. The right to operate a gin.

As an incident to this latter right, it granted the right to collect such charges or tolls as may be fixed by the State in return for the grantees' assumption of public duties and burdens. The right to collect tolls for the rendition of a public service has from the earliest times been considered a franchise.

—*Charles River Bridge Co.* v. *Warren Bridge Co. et al.*, 11 Peters 420.

Monongahela Navigation Co. v. *U. S.*, 148 U. S. 312, 328, 329.

In the opinion of the lower court it is intimated that the right granted is a mere revocable license and not a franchise, since perpetual and exclusive franchises under the Constitution of Oklahoma are prohibited.

—Article II, Sec. 32.

Article V, Sec. 51.

Article XIX, Sec. 7.

Perpetuity and exclusiveness are not essential characteristics of franchises.

—*Boise City* v. *Boise City, etc., Water Co.*, 230 U. S. 84.

Owensboro v. *Cumberland T. & T. Co.*, 230 U. S. 58.

Bartlesville Electric L. & P. Co. v. *Bartlesville Interurban Ry. Co.*, 26 Okla. 453, 455, 456.

Exclusiveness has repeatedly been held not to be one of the tests for determining whether the right granted is a license or a franchise.

—*Charles River Bridge Co.* v. *Warren Bridge Co.*, 11 Peters 420.

Long Island Water Supply Co. v. *Brooklyn*, 166 U. S. 685, 689.

Bienville Water Supply Co. v. *Mobile*, 186 U. S. 212, 217, 218, 223.

Old Colony Trust Co. v. *Omaha*, 230 U. S. 100, 115.

Bartlesville Electric L. & P. Co. v. *Bartlesville Interurban Ry. Co.*, 26 Okla. 453, 456.

Milhan et al. v. *Sharp et al.*, 27 N. Y. 611.

A right granted may still be a franchise, although subject to the constitutional and statutory powers of the State, and such other powers as may be reserved by the State in its grant.

—*Beinville Water Supply Co.* v. *Mobile*, 186 U. S. 212, 217.

The fact that the right granted is in addition subject to the police powers of the State will also not prevent it from being a franchise.

—*Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, 689.

Owensboro v. *Cumberland Telephone Co.*, 230 U. S. 58, 65.

The right granted in the instant case is subject to all the constitutional and statutory powers of the State and this fact coupled with the fact that it may be forfeited for abuse, non-user, etc., will not prevent it from being a franchise.

—*Owensboro* v. *Cumberland T. & T. Co.*, 230 U. S. 58.

Old Colony Trust Co. v. *Omaha*, 230 U. S. 100, 114.

The fact that appellant in the operation of its gin does not use any public property and is not vested with the powers of eminent domain can lend no force to the argument that its right is a mere license and not a franchise, since the right to maintain fairs and markets have been held to be a franchise.

—*Charles River Bridge Co.*, v. *Warren Bridge Co., et al.*, 11 Peters 420.

The right to engage in the banking and insurance business and to sell liquor has also been held to be a franchise to be enjoyed by those to whom such privilege is granted

by the laws of the State, and it is no less a franchise although the business to be engaged in was one which might lawfully have been pursued by anyone at common law without permission from the sovereignty.

While a francise must come from the sovereignty it may delegate its right to some other body such as a municipality or, in this instance, the Corporation Commission.

Owensboro v. *Cumberland T. & T. Co.*, 230 U. S. 58, 65.

In the opinion of the lower court very little consideration is devoted to the question of the nature of the right granted appellant. The court assumes appellant has a property right entitled to protection but intimates that had it gone into the question that its holding would be that the right is a mere revocable license on authority of *Boise City Artesian Hot & Cold Water Co.* v. *Boise City*, 123 Fed. 232. The selection of this case to sustain the court's position was unfortunate since the case cannot stand in view of this Court's opinion in *Boise City Artesian Hot & Cold Water Co.* v. *Boise City*, 230 U. S. 84. The case in 123 Fed. 232 is the basis of the Circuit Court of Appeals' opinion in a case of the same style in 186 Fed. 705. The mandate in this latter case which had not gone down at the time of the rendition of this Court's opinion in 230 U. S. 84 was directed to be issued in conformity therewith. 208 Fed. 546.

The court below evidently conceived appellant's rights

to be similar to the rights of the Boise City Artesian Hot & Cold Water Co. We agree with the lower court the rights granted are similar and under this Court's opinion these rights are of sufficient substance to be entitled to protection. In no case which we have examined except that in 123 Fed. 232, can we find a holding to the effect that a right granted to engage in a completely regulated public business under which large expenditures have been made is a mere revocable license. *Owensboro* v. *Cumberland Telephone Co.*, 230 U. S. 58, 64. Such a position is unreasonable and the presumption is the other way, as was pointed in the Court's opinion in 230 U. S. 89, 90, 91.

II.

The right held by appellant to operate a gin will be protected by a court of equity.

The next question which naturally arises is as to whether a court of equity will lend its aid and by means of an injunction to restrain others who seek to establish gins to compete with appellant under authority of a void law. Courts of equity have from the earliest times protected the enjoinment of franchises by means of injunctions.

—*Owensboro* v. *Cumberland Telephone Co.*, 230 U. S. 58, 65.

Boise Water Co. v. *Boise City*, 230 U. S. 84, 90.

They are recognized as property and scrupulously

guarded. In Mr. Justice M'Lean's opinion in *Charles River Bridge Co. v. Warren Bridge, et al.*, 11 Peters 402, 560, we find the following:

> "The franchise though incorporeal in legal contemplation has body and extension; and having been granted is not less scrupulously guarded by the principles of law than an interest in the soil."

It is also held that the tolls are charges collected by the grantee and the profit therefrom, if interfered with, constitutes a taking of property. In that case an injunction was sought by the Charles River Bridge Company against the Warren Bridge Company on the ground that the Warren Bridge Company was asserting a franchise under a void law. The jurisdiction of the Court to entertain the bill was sustained and in support of its conclusion we find the following at page 572:

> "In the case of *Osborne et al. v. Bank of United States*, 9 Wheat 738, this Court says:
>
> "'The Circuit Courts of the United States have jurisdiction over a bill in equity filed by the Bank of the United States for the purpose of protecting the bank in the exercise of its franchises which are threatened with invasion aand destruction under an unconstitutional state law; and as the state itself cannot be made a defendant, it may be maintained against the officers and agents of the State who are appointed to execute such laws.'"

Mr. Justice Story in his dissenting opinion agreed with a majority that a court of equity had jurisdiction of

the case and in support thereof quotes from Paston J., 22 Hen. Vi. 14b, as follows (page 620).

> " 'If, says he, I have a market or a fair on a particular day and another sets up a market or a fair on the same day in a ville, which is near to my market so that my market or my fair is impaired, I shall have against him an assize of nuisance or an action on the case.'
>
> "And the same law is:
>
> " 'If I have an ancient ferry in ville and another sets up another ferry upon the same river near to my ferry so that the profits of my ferry are impaired, I shall have an action on the case against him.' "

See, also:

—*Osborne* v. *Bank of United States*, 9 Wheat. 738.

New Orleans Gas Co. v. *Louisiana Light Co.*, 115 U. S. 650.

Appellant under its grant from the State does not have the exclusive right to maintain and operate a gin in the City of Durant. Its grant, however, will be protected from impairment or destruction by other gins the maintenance and operation of which are sought to be sustained under a void law. The grant to plaintiff, while not exclusive in the sense that other valid grants may not be made, is nevertheless exclusive insofar as all persons or corporations are concerned to whom a valid grant has not been made. This identical question of a court of equity's jurisdiction has been before the Supreme Court of Oklahoma several times.

—*Bartlesville Electric Light & Power Co.* v. *Bartlesville Interurban Ry. Co.*, 26 Okla. 453, 29 L. R. A. (N. S.) 77.

Tulsa Street Ry. Co. v. *Oklahoma Union Traction Co.*, 27 Okla. 339, 342, 343.

Henry v. *Bartlesville G. & O. Co.*, 33 Okla. 473, 478.

Melville Gas Light Co. v. *Vineland L. & P Co.*, 72 N. J. Eq. 305.

In the case of *Bartlesville Electric Light & Power Co.* v. *Bartlesville Interurban R. Co., supra*, the following appears in the syllabus.

> "An ordinance of a municipal corporation granting to a corporation authority to use the streets, alleys and public grounds of a city for the purpose of constructing and operating an electric light and power plant to furnish light and power to a city and its inhabitants confers privileges which are exclusive in their nature against all persons upon whom similar rights have not been conferred; and any person or corporation attempting to exercise such right without legislative authority or sanction, invades the private property rights of the corporation to whom such franchise has been granted, and may be restrained at the instance of the owner of the franchise."

In *Peoples Transit Co.* v. *Henshaw*, 20 Fed. (2nd) 87, the Circuit Court of Appeals for the Eighth Circuit reviewed a decree of the United States District Court for the Western District of Oklahoma and concluded that the injunction granted by the lower court protecting the receivers of a street railway company in the enjoinment of its fran-

chise against unlawful competition was proper. In that case the franchise of the street railway company was not exclusive in the sense that a franchise could not be legally granted to a competitive company. The Court intervened, however, to protect the holder of the franchise and its revenues derived thereunder from impairment by the acts of the others who either had no franchise or sought to justify their acts under a void grant. The Court summed up its position as follows:

> "It is very clear that the operation of busses in violation of the ordinance would directly affect the revenues of appellees, that it is vital property interest to them."

In Pomeroy's Equity Jurisprudence, Vol. 5, Sections 2016, 2017, this subject is considered and a portion of Section 2017 reads as follows:

> "It is not necessary, 'to entitle the owner to relief in equity, that the franchise should be an exclusive franchise in the sense that the grant of another similar franchise to be exercised and enjoyed at the same place would be void.' The theory is 'that the defendant, who has no franchise, is acting in violation of law in operating * * * without authority from the sovereign power, and that the owner of the franchise may complain of and restrain such illegal acts when they result in injury to his franchise, which, in the eye of the law, is property. As to the one who is invading his rights without legal sanction, the franchise is an exclusive franchise, although the owner of it might not be entitled to any protection as against the granting of a similar franchise to another."

Appellant is denied due process of law and the equal protection of the laws.

The Act which we are challenging as denying appellant due process of law and the equal protection of the laws provides that any one desiring to maintain and operate a cotton gin must first secure permission from the State (Sec. 3713, C. O. S. 1921, as amended, see appendix), which will be granted after a hearing in the event the applicant proves the proposed gin to be a needed utility, and that the applicant is a competent and desirable person or corporation to operate the gin. The Corporation Commission also has the right to take into consideration the responsibility, reliability and qualifications, as well as the competency of the applicant. (Sec. 3714, C. O. S. 1921 as amended, see appendix.) In the event, however, the applicant desires to maintain and operate a gin "to be run co-operatively", no hearing is required if the applicant presents with his application a petition signed by one hundred citizens and taxpayers of the community, and upon the presentation of such petition it is the mandatory duty of the Commission to issue a permit regardless of public convenience and necessity, and regardless of the applicant's responsibility, reliability and qualifications. (Sec. 3714, C. O. S. 1921 as amended, see appendix.) The signers of the petition need not be farmers or cotton raisers. All could be bankers, lawyers or doctors; and as gins are generally lo-

cated in some city or town, it can be readily understood how the applicant, by appealing to local pride, can go to a chamber of commerce meeting and secure all the signatures desired.

Under the laws of the State of Oklahoma there are two so-called Co-operative Acts, Article 16, Chapter 34 (Sec. 5598-5621, inclusive, C. O. S. 1921), and Article 34, Chapter 19 (Sec. 5637-5652, inclusive, C. O. S. 1921). The first Act, Article 16, Chapter 34, provides for the formation of non-stock, non-profit, mutual help associations. Such an association, if formed for the purpose of ginning cotton, may gin for its members only.

The second Act, Article 19, Chapter 34, authorizes the formation of stock associations to engage in industrial pursuits for profit, and under this Act corporations such as appellee may be formed to engaged in the general ginning business for profit.

The lower court in the inception of its opinion states that if an Act is subject to two constructions the one will be adopted which will render the Act va[illegible] It then concludes that "to be operated co-operatively" as used in the proviso of the Act applies to associations organized under Article 16, Chapter 34, the language of the Court being as follows:

"Under this statute (Article 16, Chapter 34), a co-

operative gin may be organized by its growers and producers and operated for purpose of ginning seed cotton, preparing for market such cotton and seed, and the manufacturing of by-products thereof. A gin 'to be operated co-operatively' is a classification different from the ordinary commercial gin for which an adjudication of necessity therefor is required. Such class acting in such a co-operative way in ginning and marketing their own agricultural products in preparing their own cotton and seed and products thereof for market is a reasonable classification and not violative of the Fourteenth Amendment.

"As to said proviso for the issuance of license for gins 'to be operated co-operatively', if two constructions equally reasonable may be reached, one rendering the proviso violative of the Constitution and the other valid, that should be adopted which would permit it to stand, the presumption being that the Legislature intended that which was permissible and valid, and therefore in using the term, 'to be operated co-operatively' intended that such gin should be organized and operated under the co-operative act as contained in Article 16, Chapter 34, C. O. S. annotated 1921, and amendments thereto."

The appellee, Durant Co-operative Gin Company, however, was not organized under this Act, but under Article 19, Chapter 34, and the Supreme Court of Oklahoma has held that the exemption applies to corporations so organized. (*Choctaw Cotton Oil Co. et al.* v. *Corporation Commission et al.*, 247 Pac. 390, 121 Okla. 51.) Such is also the interpretation of said proviso by the Corporation Commission of the State which is charged with the duty of administering and enforcing the Act.

The lower Court next held in its opinion that the exemption in the gin Act applied to associations organized under the latter statute as well as under former non-stock, non-profit, mutual help Act, its view being that the separate classification of such associations was proper since their internal corporate affairs were in some particulars handled in a different manner than those of corporations generally, although so far as the public in general is concerned their external affairs are handled in the same manner.

In considering this case we feel sure that the Court will not be confused by the discussion in the lower Court's opinion of a good many matters and facts which have nothing to do with this case. As will be observed, it was tried on an agreed statement of facts. We bring this matter to the Court's attention since the lower Court, we judge from its opinion, was influenced more by the pleadings than by the facts. The articles of incorporation of appellee, Durant Co-operative Gin Company, are set forth in the agreed statement of facts. It will be observed from them that it may engage in the general ginning and cotton seed business and its ginning rates are fixed by the Corporation Commission.

As far as the public is concerned, appellant and appellee gin company are similarly situated. The lower Court held, nevertheless, that it was proper to separately classify

them and to accord more favorable treatment to one than to the other. Such classification, we contend, is arbitrary, discriminatory, without any reasonable basis, and therefore a denial of the equal protection of the laws.

The due process and the equal protection clauses of the Fourteenth Amendment have been so often construed by this Court that it would be presumptious on our part to burden the Court with an extended discussion. The meaning of the equal protection clause and its extent was defined in *Ex Parte Virginia*, 100 U. S. 339, as follows:

> "It suffers no other or greater burden or charges to be laid upon one man that such as are equally borne by others."

In *Barbier* v. *Connoly*, 113 U. S. 27-31, the Court said the effect of the clause was:

> "That no impediment should be imposed on the pursuits of any one except as applied to the same pursuits of others under like circumstances; that no greater burden should be laid upon one man than are laid upon others in the same calling and condition."

In *Truax* v. *Corrigan*, 257 U. S. 312, 333, after discussing the earlier cases dealing with the equal protection clause, it was said:

> "Thus the guarantee was intended to secure equality of protection not only for all but against all similarly situated. Indeed, protection is not protection unless it does so. Immunity granted to a class, however limited, having the effect to deprive another class however limited, of a personal or property right is just as

clearly a denial of equal protection of the laws to the latter cass as if the immunity were in favor of or the deprivation of right permitted worked against the larger class."

—*Ex Parte Virginia*, 100 U. S. 339.

Barbier v. *Connoly*, 113 U. S. 27, 32.

Soon Hing v. *Crowley*, 113 U. S. 703, 709.

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Southern Ry. v. *Greene*, 216 U. S. 400.

A. T. & S.F. v. *Vosburg*, 238 U. S. 56.

Truax v. *Raich*, 239 U. S. 33.

Truax v. *Corrigan*, 257 U. S. 312.

Power Mfg. Co. v. *Saunders*, 274 U. S. 490.

Quaker City Cab Co. v. *Pennsylvania*, not yet reported, filed May 28, 1928.

We recognize that the amendment does not prevent proper classification by the Legislature, but it:

"* * * does require that the classification be not arbitrary but based upon a real and substantial difference, having a reasonable relation to the subject of the particular legislation. (*Power Mfg. Co.* v. *Saunders*, 274 U. S. 490.)"

—*Southern Railway Co.* v. *Greene*, 216 U. S. 400, 417.

The reasonableness of the classification is, of course, open to judicial review.

G. C. & S. F. Ry. Co. v. *Ellis*, 165 U. S. 150.

We also recognize the fact that no general rule can be formulated which will apply to every case, and that in determining:

> "Whether equal protection is denied there must be a consideration of the peculiar facts." (*Liberty Warehouse Co.* v. *Burley Tobacco Growers Co-operative Market Assn.*, not yet reported; opinion filed Feb. 20, 1928.)
>
> —*Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

We contend in the instant case that the classification is arbitrary, capricious and based on no substantial difference, having a reasonable relation to the subject and purpose of the legislation. The classification depends upon ownership alone, and this Court, in *Quaker City Cab Company* v. *Pennsylvania* (not yet officially reported; opinion filed May 28, 1928) struck down the Act there in question as denying equal protection, because "the character of the owner is the sole fact on which the distinction and discrimination are made to depend." The business of appellant, an individual, and the authorized business of appellee, Durant Co-operative Gin Company, is identical. The Act says that all persons desiring to maintain and operate a cotton gin must comply with the Act and make a showing

of public necessity, convenience, etc., while a company organized under Article 19, Chapter 34, is exempt from such requirement.

The lower Court was evidently under the erroneous impression that appellant was a corporation, for in its opinion considerable space is devoted to pointing out the differences between an ordinary corporation organized under the general law and a corporation such as appellee organized under Article 19, Chapter 34.

The difference between an individual owner and a corporation organized under Article 19, Chapter 34, is no greater than the difference between an individual and a corporation organized under the general law, and this Court has held that the latter difference is not sufficient to justify classification and discriminatory treatment of corporations in favor of individuals similarly situated.

> *Kentucky Co.* v. *Paramount Exchange*, 262 U. S. 490.
>
> *Quaker City Cab Co.* v. *Pennsylvania*, not reported, opinion filed May 28, 1928.

The instant case appears to us to be stronger than the foregoing, because an individual owner of a gin is herein discriminated against in favor of a corporation.

Our position is well summed up in the case of *State* v. *Nashville C. & S. L. Ry. Co.*, 124 Tenn. 1, wherein the Court said:

"It does not apply to natural persons, either as individuals or members of a partnership or firm, engaged in conducting the same business, and with similar employes. New burdens and restrictions are placed upon corporations, the property of which belongs to individual shareholders, which are not placed upon natural persons engaged in the same business, conducted in the same way and at the same place. We can see no good reason or natural and reasonable basis for this discrimination. None has been suggested or can be suggested, for they do not exist. The application of the statute is made to depend solely upon whether the employer is a natural or artificial person, between which, within the protection of the constitutional provisions invoked, there is no distinction. The distinction made is in the character of the employer, and not in that of the employment or business conducted."

One of the cases upon which we place our chief reliance is that of *Connolly* v. *Union Sewer Pipe Company*, 184 U. S. 540, and that case's application is made still more apparent in the light of its explanation by this Court in *Liberty Warehouse Co.* v. *Burley Tobacco Growers Co-operative Marketing Assn.* (not yet reported; opinion filed Feb. 20, 1928):

"*Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, is much relied upon. But there the circumstances differed radically from those here presented; and always to determine whether equal protection is denied there must be consideration of the peculiar facts. Connolly resisted judgment for the purchase price of pipe upon the ground that the Union Company, the vendor, belonged to a combination or trust, made participation therein criminal, and directed that those who purchased articles from an offending member should not

be held liable for the price. Section 9 declared: 'The provisions of this Act shall not apply to agricultural products or livestock while in the hands of the producer or raiser.' This Court held that because of the exemption the Union Company was denied the equal protection of the law. It was forbidden to do what others could do with impunity. Here the situation is very different. The questioned statute undertakes to protect sanctioned contracts against interference—no one could lawfully do what the warehouse company did."

Appellant here is forbidden to do what others can do—operate a gin without a showing of public convenience, and necessity, etc. By the terms of the Act all are forbidden to maintain and operate a gin without such a showing, and then a special, favored group is exempted. Just as in the Union Sewer Pipe case all were forbidden to participate in combinations and trusts, and then the Act specifically exempted from its operation "agricultural products or livestock while in the hands of the producer or raiser."

The purpose of the gin Act was to regulate the number of gins, and by such regulation provide only a sufficient number to take care of the cotton raised in their vicinity. The Legislature recognized the fact that so far as the public was concerned it was economically unsound to have more gins than necessary to handle the crop. It knew that with the declaration that the ginning of seed cotton was a public business and subject to regulation particularly as to rates, that a reasonable return on the property de-

voted to the public service must be allowed. It desired by this Act to make a decrease in rates possible or to at least prevent an increase in rates which would naturally follow if more gins were established than were reasonably required.

With such a clear purpose in mind, is there any reasonable basis for declaring the public policy of the State in one breath and then nullifying it by an exemption in the next? If the establishment of more gins than are required is contrary to public policy as tending to increase ginning rates, what difference does it make whether they are established by individuals, partnerships, corporations organized under the general law, or corporations organized under Article 19, Chapter 34. All are in the same general class; all are engaged in ginning for hire at the same rates the cotton offered them by the general public—they are engaged in a business by statute open to all, "subject to such regulations, applicable alike to all in like conditions as the State may legally prescribe." *Connoly* v. *Union Sewer Pipe Company,* 184 U. S. 540, 560. We cannot perceive if the unrestrained establishment of gins is "hurtful to the public interest" as declared by the Legislature, and should be regulated and restrained, why their establishment by corporations organized under Act 19, Chapter 34, "is not also hurtful." *Connolly* v. *Union Sewer Pipe Company,* 184 U. S. 540, 564.

"It is quite a different thing for the State, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute, making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary and plainly denies the equal protection of the laws to those against whom it discriminates."

—*Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 563.

The proviso is separable from the remainder of the Act.

The proviso alone should be held invalid. The Legislature so desired, and its intent must usually be determined by the Court from a consideration of the interdependence of portions of the Act in question.

Loeb v. *Township Trustees*, 179 U. S. 472, 490.

Connolly v. *Union Sewer Pipe Co.*, 184 U. S. 540, 565.

Berea College v. *Kentucky*, 211 U. S. 45, 54, 55.

Truax v. *Corrigan*, 257 U. S. 312, 341, 342.

The legislative intent in regard to the Act involved herein is clearly expressed in Section 3718, C. O. S. 1921:

"If it shall be held that any section or part of a section contained in this Act is void by reason of it being repugnant to the Constitution, the failure of such portion shall not be held to defeat the remaining portions of this Act."

In addition to the legislative declaration contained in the foregoing section, it will be remembered that the challenged proviso did not appear in the original Act or in its 1923 amendment, but was added by the Legislature in 1925.

CONCLUSION.

It is respectfully submitted that the United States District Court for the Western District of Oklahoma erred in denying appellant a permanent injunction, and its action in so doing should be reversed.

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APPENDIX

OKLAHOMA STATUTES

The present Oklahoma statutes affecting cotton gins, insofar as applicable herein, are as follows:

Section 3712, C. O. S. 1921 (Sess. L. 1915):

"*Cotton Gins—Declared Public Utility.* That cotton gins are hereby declared to be public utilities, and the operation of same for the purpose of ginning seed cotton is declared to be a public business."

Section 3713, C. O. S. 1921 (as amended, Ch. 191, p. 340, Sess. L. 1923):

"*Cotton Gins—License.* 1. No person or persons, or corporation in this State, shall be permitted to maintain and operate a gin for the purpose of ginning seed cotton without first having secured a license for such purpose from the State Corporation Commission, said license to be issued upon proper showing to be made as prescribed by the rules and regulations promulgated by the Commission. The fee for said license issued by the Corporation Commission is hereby fixed at three (3c) cents per bale, based on the number of bales ginned the previous year as shown by the final report of said gin on file with the Corporation Commission. In case of a new plant or a gin that did not operate the preceding year, a license fee of five dollars ($5.00) per gin stand will be charged; which sum shall be converted into the state treasury of the State of Oklahoma."

Section 3714, C. O. S. 1921 (Sess. L. 1915, as amended by Sec. 1, Ch. 109, p. 157, Sess. L. 1925):

"*Corporation Commission—Licenses.* 1. The Corporation Commission, in issuing such license, shall have the right to take into consideration the necessity for the operation of a gin for such purpose at the place of its location; provided nothing herein shall operate to prevent the licensing of gins now established, except for violation of the provisions of this Act or of the rules, regulations and requirements of the Corporation Commission made and promulgated pursuant to this Act. No new gin plants shall be constructed, installed or licensed, or any old gin removed from one point to another until satisfactory showing shall have been made to the Corporation Commission setting forth that such gin is a needed utility and that the proposed corporation, company, firm or individual is a competent and desirable corporation, company, firm or individual to establish and operate said gin as may appear in the discretion of said Commission; provided, that on the presentation of a petition for the establishment of a gin to be run co-operatively, signed by one hundred (100) citizens and taxpayers of the community where the gin is to be located, the Corporation Commission shall issue a license for said gin. The Commission shall have the right to take into consideration the responsibility and reliability and qualifications as well as the capacity of the person or persons or corporation to do such ginning business so far as to afford all reasonable facilities, conveniences and service to the public, and shall have the power and authority to require such services to be afforded the public. The inspectors provided herein shall be men who have served at least three years in practical and actual gin operation and shall be appointed by the Corporation Commission; that said inspectors shall have the power to make recommendations to the Commission as to the opening or closing of any gin or gins as well as to the affording by such gins of the reasonable facilities, conveniences and services to the public hereinbefore authorized to be required,

as well as to make such other reports and recommendations to the Corporation Commission as may, to said inspectors, appear necessary, reasonable and just."

Section 3715, C. O. S. 1921, as amended by Section 3, Ch. 191, Session Laws 1923:

"*Same—Power and Authority.*

"Section 3. That Section 3715, Compiled Oklahoma Statutes 1921, be and the same is hereby amended to reads as follows, too wit: (Sic) 3715. That the Corporation Commission shall have the same power and authority and be charged with the duty of regulating and controlling such cotton gins in all matters relating to the performance of public duties and the charges therefor, and correcting abuses and preventing unjust discrimination and extortion, as is exercised by said Commission as to transportation and transmission companies, and shall have the same power to fix rates, rules, charges and regulations to be observed by such person or persons or corporation, facilities and services as it may impose as to transportation or transmission companies. For the purpose of carrying into effect the provisions of this Act, there is hereby created a department of Cotton Gin Utilities under the Corporation Commission. The Commission shall appoint four inspectors of cotton gins, one of whom shall be selected as head of such department, who shall receive a salary of two thousand ($2,000.00) dollars per annum, whose functions, duties and term of office shall be regulated at the discretion of the Commission. There is also provided a stenographer for such Commission who shall receive a salary of twelve hundred ($1,200.00) dollars per annum. The fiscal year of all cotton gin utilities shall terminate March 31, 1924, and annually each year thereafter, and it shall be the duty of each and every corporation, company, firm or individual owning or operating a cotton gin to file a final report for the preceding year not later than 30 days

following the expiration of said fiscal year. Failure to file said report shall constitute a forfeiture of license and is hereby declared a misdemeanor and may be prosecuted as such. Said report to be in accordance with rules and regulations promulgated by the Commission from time to time."

Sections 3716, 3717 and 3718, C. O. S. 1921 (Sess. L. 1915):

"3716. *Appeals to the Supreme Court.* The orders made by said Commission fixing rates, charges, rules and regulations as to any person, persons, or corporation operating any gin or gins may be reviewed on appeal by the Supreme Court in the same manner, form, jurisdiction and procedure as apply to such orders made relative to transportation and transmission companies.

"3717. *Regulations—Enforcement of Orders.* That in all matters pertaining to the regulation and control of gins and ginning and the business of such, the Commission shall have the same power and authority as is now exercised by it under the law as to any matter pertaining to the public visitation, regulation or control of transportation and transmission companies, and may enforce its orders against any person, firm, company or corporation maintaining or operating a gin or gins, by imposing a fine against them, or either of them, not exceeding $100 for the violation of any of its orders.

"3718. *Validity of Several Sections.* If it shall be held that any section or part of a section contained in this Act is void by reason of it being repugnant to the Constitution, the failure of such portion shall not be held to defeat the remaining portions of this Act."

Section 3714, C. O. S. 1921, before amendment was as follows:

"3714. *Power of Corporation Commission—Location of Gins.* That the Corporation Commission, in issuing such license, shall have the right to take into consideration the necessity for the operation of a gin for such purpose at the place it is located; provided, nothing herein shall operate to prevent the licensing of gins now established. If the facts disclose that the ginning facilities afforded by gins already licensed are adequate for the reasonable demands of such place for the ginning of cotton, the said Corporation Commission will be justified in refusing such license; provided, that on the presentation of a petition signed by not less than fifty farmer petitioners of the immediate vicinity, the Corporation Commission must issue a license as set out in petition. In addition to said authority, said Commission shall have a right to take into consideration the responsibility, reliability and qualifications and the capacity of the person or persons, or corporations, to do such ginning business as to afford all reasonable facilities, conveniences and service to the public, and shall have the power and authority to require such facilities, conveniences and services to be afforded the public."

Section 3714, C. O. S. 1921, as amended by Section 2, Ch. 191, Session Laws 1923, but before the 1925 amendment, read:

"*Corporation Commission—Licenses.*

"Section 2. That Section 3714 of Compiled Oklahoma Statutes, Annotated, 1921, be and the same is hereby amended to read as follows:

"Section 3714. That the Corporation Commission in issuing such license shall have right to take into consideration the necessity for the operation of a gin for such purpose at the place of its location; provided, nothing herein shall operate to prevent the licensing of gins now established, except for violation of the

provisions of this Act or of the rules, regulations and requirements of the Corporation Commission made and promulgated pursuant to this Act. No new gin plants shall be constructed, installed, or licensed, or any old gin removed from one point to another until satisfactory showing shall have been made to the Corporation Commission setting forth that such gin is a needed utility, and that the proposed corporation, company, firm or individual is a competent and desirable person, corporation, company, firm or individual to establish and operate said gin as may appear in the discretion of said Commission. The Commission shall have the right to take into consideration the responsibility and reliability and qualifications as well as the capacity of the person or persons or corporation to do such ginning business, so as to afford all reasonable facilities, conveniences and services to the public, and shall have power and authority to require such facilities, conveniences and services to be afforded the public. The inspectors provided herein shall be men who have served at least three years in practical and actual gin operation, and shall be appointed by the Corporation Commission; that said inspectors shall have the power to make recommendations to the Commission as to the opening or closing of any gin or gins as well as to the affording by such gins of the reasonable facilities, conveniences and services to the public hereinbefore authorized to be required, as well as to make such other reports and recommendations to the Corporation Commission as may, to said inspectors, appear necessary, reasonable and just."

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NO. 60

In the Supreme Court of the United States

OCTOBER TERM, 1928.

W. A. FROST, Doing Business Under the Name of Mitchell Gin Company,
Appellant.

vs.

CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, FRED CAPSHAW, FRANK CARTER, ETC., ET AL.,
Appellees.

BRIEF AND PRINTED ARGUMENT FOR STATE OF OKLAHOMA, THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, FRED CAPSHAW ET AL., APPELLEES.

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NO. 60

In the Supreme Court of the United States

OCTOBER TERM, 1928.

W. A. FROST, Doing Business Under the Name of Mitchell Gin Company,
Appellant,

vs.

CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, FRED CAPSHAW, FRANK CARTER, ETC., ET AL.,
Appellees.

BRIEF AND PRINTED ARGUMENT FOR STATE OF OKLAHOMA, THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, FRED CAPSHAW ET AL., APPELLEES.

Statement

This suit was originally instituted in the United States District Court for the Western District of the State of Oklahoma on April 14, 1926, by the filing of a bill by appellant, praying for both an interlocutory and permanent injunction against the Corporation Commission of the State of Oklahoma, together with its members, and the Durant Co-operative Gin Company, seeking to enjoin the Corporation Commission from issuing to the gin company a cot-

ton gin license. Appellant W. A. Frost is an individual doing business under the firm name of Mitchell Gin Company and engaged in the business of operating a cotton gin in the city of Durant, Oklahoma (R. 65).

The Legislature of the State of Oklahoma in 1915 passed an Act declaring cotton gins to be public utilities, and the operation of same for the purpose of ginning seed cotton to be a public business. The Act also provided that no person or persons or corporation should thereafter be permitted to maintain and operate a gin for the purpose of ginning seed cotton without first having secured a license for such purpose from the State Corporation Commission.

Section 3 of the Act sets forth the requirements which must be met by an applicant for license or permission to engage in the business of ginning cotton. This is the section which is immediately involved in this cause. Section 3 of the original Act, which is found at Section 3714, Compiled Oklahoma Statutes 1921, reads as follows, to-wit:

> "That the Corporation Commission, in issuing such license, shall have the right to take into consideration the necessity for the operation of a gin for such purpose at the place it is located; provided, nothing herein shall operate to prevent the licensing of gins now established. If the facts disclose that the ginning facilities afforded by gins already licensed are adequate for the reasonable demands for such place for the ginning of cotton, the said Corporation Commission will be justified in refusing such license; provided, that on the

presentation of a petition signed by not less than fifty farmer petitioners of the immediate vicinity, the Corporation Commission must issue a license as set out in petition. In addition to said authority said Commission shall have a right to take into consideration the responsibility, reliability and the qualifications, and the capacity of the person or persons, or corporations to do such ginning business as to afford all reasonable facilities, conveniences and services to the public and shall have the power and authority to require such facilities, conveniences and services to be afforded the public."

The Legislature of 1925, by House Bill 109, Session Laws 1925, amended Section 3714 by inserting a proviso in the section after the provision with respect to the showing which shall be made by an applicant for a cotton gin, as a condition precedent to the granting of a license, and which proviso reads as follows, to-wit:

> "Provided that on the presentation of a petition for the establishment of a gin *to be run co-operatively*, signed by one hundred (100) citizens and taxpayers in the community where the gin is to be located, the Corporation Commission shall issue a license for said gin."

It is this proviso that is being attacked in this cause as being repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States, guaranteeing due process and equal protection of the laws.

The jurisdiction of the District Court was invoked on the ground that the announced intention of the Corporation Commission to issue a license in favor of the Durant Co-

operative Gin Company authorizing it to construct, maintain and operate a cotton gin, was in violation of rights vested in appellant under the Fourteenth Amendment to the Constitution of the United States, and particularly that portion thereof guaranteeing due process of law and the equal protection of the laws. A court of three judges convened pursuant to Section 266 of the Judicial Code, denied the temporary injunction, and appellant prosecuted his appeal to this Court (No. 375, October Term, 1926), and in which appeal this Court affirmed the action of the District Court in denying a temporary injunction on authority of *Chicago, G. W. R. Co.* v. *Kendall*, 266 U. S. 94, 100, in a Memorandum Opinion by this Court on May 2, 1927, *W. A. Frost* v. *Corporation Commission et al.*, 274 U. S. 719, 47 Sup. Ct. Rep. 589, 71 L. ed. —. Thereafter, upon application of appellant the matter was set again before the three-judge court for final hearing upon his application for permanent injunction, and a final hearing was conducted before the same three judges, the Honorable Asa Van Valkenburg, the Honorable J. H. Cotterall, and the Honorable R. L. Williams, on December 13, 1927, after which a decree was entered and an opinion handed down dismissing appellant's bill. 26 Fed. (2nd) 508, *Frost* v. *Corporation Commission et al.* From the decision of the three-judge court, this appeal is prosecuted and involves identically the same questions of fact, as well as the same questions of law which were involved in the original appeal and decided by this

Court upon May 2, 1927. No testimony was taken, the case being tried upon a stipulation of facts identical with the facts presented in the former appeal.

Summary of Agreed Statement of Facts.

For the purpose of the hearing before the three judges, an agreed statement of facts was entered into as set forth in appellant's brief, page 4 (R. 64), which may be briefly expressed as follows:

Appellant W. A. Frost is engaged in the operation of a cotton gin as owner thereof, in the city of Durant, Oklahoma, operating under and by virtue of a license duly issued by the Corporation Commission (R. 65) as provided by Article 40, Chapter 7, Section 3714, C. O. S. 1921, as amended by Chapter 191, Session Laws of Oklahoma 1923, and by Chapter 109, Session Laws of Oklahoma 1925; that it is agreed that the Durant Co-operative Gin Company filed with the Corporation Commission its application in 1926 for permission to establish a cotton gin at Durant, protest having been made by appellant in writing against the issuance of such license or permit, and that a hearing was thereafter had before the Corporation Commission of the State of Oklahoma on April 3 and April 14, 1926 (R. 68) at which time appellant herein objected to the introduction of evidence on the ground that Section 3714, C. O. S. 1921, as amended by the Act of 1925, providing that:

> "On the presentation of a petition for the establishment of a gin to be run co-operatively, signed by one hundred citizens and taxpayers of the community where the gin is to be located, the Commission shall issue a license for said gin"

is unconstitutional on the ground that it is discriminatory, arbitrary, and denied appellant due process of law and the equal protection of the laws, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States (R. 69).

It was agreed that the Corporation Commission of the State of Oklahoma overruled appellant's objection to the constitutionality of the statute, and that thereupon the Durant Co-operative Gin Company introduced its articles of incorporation, together with the application for the license desired, with the requisite number of signatures attached thereto and requisite under the provisions and terms of the Amendment of 1925; that appellant was denied the right to introduce evidence in support of his protest and was refused permission to cross-examine the applicant's witnesses except upon the question of whether or not full compliance with the statute had been made. It is agreed that in sustaining the objection to the evidence submitted and to the cross-examination, the Commission announced, through Chairman Capshaw (R. 72) as follows:

> "Chairman Capshaw: And the Commission is going to refuse to permit any evidence on behalf of the protestant in regard to the necessity or for the pur-

pose of showing there is no necessity for any additional gins at this point on the theory that under the law passed by the 1925 Legislature, it is mandatory to grant these permits whether there is any necessity or not."

"Mr. Rainey: Exception."

"Chairman Capshaw: The Commission announces that the permit applied for in this cause will be issued by the Commission after a conference of the full Commission and within the next few days. That permit will be held up pending the conference of the full Commission, but will not be held up to exceed a few days."

The full opinion of the three judges in dismissing the bill of complaint and denying the relief petitioned for therein is found on page 29 of the printed record.

Question Presented.

The question presented here is whether the amendment adopted by the Legislature of the State of Oklahoma in 1925, requiring the issuance of a license at the hands of the Corporation Commission *for the operation of gins to be run co-operatively,* signed by one hundred citizens and taxpayers of the community where the gin is to be located, contravenes the Fourteenth Amendment to the Constitution of the United States by denying appellant due process of law and by denying him the equal protection of the law, and the additional question of whether or not appellant by his pleadings and by the stipulated facts has shown sufficient interest to entitle him to maintain this action and to invoke the protection provided by the terms and provisions of the Fourteenth Amendment to the Constitution.

Appellant presents his argument and authorities under the following heads:

1. Appellant's right to maintain and operate a gin is a franchise or a property right in the nature of a franchise.
2. The right held by appellant to operate a gin will be protected by a court of equity.
3. Appellant is denied due process of law and equal protection of the laws.
4. The proviso is separable from the remainder of the Act.

Appellees in submitting their argument and authorities will follow the same order and the same division of the questions, with the exception that they shall submit first the question of whether or not appellant shows by his pleadings and the facts stipulated, such an interest as entitles him to raise the constitutional question of the protection afforded by the Fourteenth Amendment to the Constitution of the United States. This issue was raised in the motion to dismiss and answer filed by appellees in the lower court on April 24, 1926, and found at page 6 of the transcript of the record.

ARGUMENT AND AUTHORITIES.

Proposition I.

Appellant has nowhere shown that the enforcement of the challenged statute would deprive it—not another—of some right arising under the Fourteenth Amendment to the Constitution of the United States properly asserted below.

—*Southern R. R. Co.* v. *King,* 217 U. S. 524, 54 L. ed. 868.

Standard Stock Food Co. v. *Wright,* 225 U. S. 540, 56 L. ed. 1197.

Hendrick v. *Maryland,* 235 U. S. 610, 59 L. ed. 385.

Jeffry Mfg. Co. v. *Blagg,* 235 U. S. 571, 59 L. ed. 364.

Dahnke-Walker Milling Co. v. *Bondurant,* 257 U. S. 282, 66 L. ed. 239..

Tyler v. *Registration Ct. Judges,* 179 U. S. 405, 45 L. ed. 252.

Turpin v. *Lemon,* 187 U. S. 51, 47 L. ed. 70.

Hooker v. *Burr,* 194 U. S. 415, 48 L. ed. 1046.

New York ex rel. Hatch v. *Reardon,* 204 U. S. 152, 51 L. ed. 415.

Liberty Warehouse Co. v. *Burley Tobacco Growers Co-operative Assn.,* 72 L. ed. 294.

Rosenthal v. *New York,* 226 U. S. 260, 57 L. ed. 212.

Clark v. *Kansas City,* 176 U. S. 114, 44 L. ed. 392.

Williams v. *Walsh,* 222 U. S. 415, 56 L. ed. 253.

M. K. T. R. R. Co. of Texas v. *Cade,* 233 U. S. 642, 58 L. ed. 1135.

Choctaw Cotton Oil Co. v. *Corporation Commission of Oklahoma*, 247 Pac. 390.

Lee v. *New Jersey*, 207 U. S. 67, 52 L. ed. 106.

Aluminum Co. v. *Ramsey*, 222 U. S. 251, 56 L. ed. 185.

Murphy v. *California*, 225 U. S. 623, 56 L. ed. 1229.

Darnell v. *Indiana*, 226 U. S. 390, 57 L. ed. 267.

Interstate Busses Corp. v. *Holyoke Street Ry. Co.*, 273 U. S. 45, 71 L. ed. 530.

Plymouth Coal Co. v. *Pennsylvania*, 232 U. S. 545, 58 L. ed. 719.

In the case of *Southern Railroad Co.* v. *King*, 217 U. S. 524, 54 L. ed. 868, there was involved the constitutionality of a statute of the State of Georgia requiring railway trains to blow the whistle and to reduce the speed of trains at each whistling post along the line of the railway in that State. In disposing of the contention that the statute was a violation of the commerce act, Mr. Justice Day said with respect to the rights of appellant therein:

> "It is a settled law of this court that one who would strike down a state statute as violative of the Federal Constitution, must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him and so operates as to deprive him of rights protected by the Federal Constitution."

Continuing the discussion, the Court said with respect to the rights asserted by appellant:

"The amended answer contains the general statement that the statute is in violation of the commerce clause of the Constitution and a direct burden upon and impedes interstate traffic and impairs the usefulness of defendant's facilities for that purpose; that it is impossible to observe the statute in carrying mail and in interstate commerce business. *But these averments are mere conclusions. They set forth no facts which would make the operation of the statute unconstitutional.* * * * *In the absence of facts setting up a situation showing the unreasonable character of the statute as applied to the defendant under the circumstances, we think the amended answer set up no legal defense, and that the demurrer thereto was properly sustained.*"

The case of *Standard Stock Food Co.* v. *Wright,* 225 U. S. 540, 56 L. ed. 1197, *supra,* involved the constitutionality of a statute of the State of Iowa relating to the sale of concentrated commercial feeding stuffs in that State, and requiring the inspection thereof, and in lieu of the inspection fee on condimental, patented, proprietary, or trademark stock or poultry foods, required the payment of a fee of $100.00, whereas the inspection fee generally was 10c per ton, and which the stock food company claimed was a discrimination against it. This Court said:

"If it be said that this provision discriminates against one doing a small business, still the appellant wholly fails to show that it is thereby injured and thus entitled to complain. On the contrary, the bill alleges that the appellant 'sells to more than 800 dealers in the State of Iowa, besides a very large number of customers who buy direct from your orator or through its agents,' and that it has been enabled to sell in the State of Iowa during the past year and for a number of

years preceding a quantity of its goods in an amount exceeding $40,000.00 per annum. The case in this aspect falls within the established rule that 'one who would strike down a state statute as violative of the Federal Constitution must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him, and so operates as to deprive him of rights protected by the Federal Constitution.'' (Citing numerous decisions of this Court, as well as of other Courts.)

The case of *Hendricks* v. *Maryland,* 235 U. S. 610, 59 L. ed. 385, involved an act of the State of Maryland requiring the licensing of automobile vehicles within that State, but providing that any owner or operator of an automobile, non-resident of Maryland, who has complied with the laws of the State in which he resides, requiring the registration of motor vehicles or licensing of operators thereof, may, under specified conditions, obtain a distinguishing tag and permission to operate such machine over the highways for not exceeding two periods of seven consecutive days in a calendar year without paying the ordinary fees for registration and operators' license; but excluding residents of the District of Columbia from those to whom this last privilege is granted. Appellant, a resident of the District of Columbia, was charged with the violation of this statute and was convicted after raising constitutional questions in defense. The case reached this Court on appeal and was disposed of in an opinion by Mr. Justice McReynolds, in which the Court said:

"If the statute is otherwise valid, the alleged discrimination against residents of the District of Columbia is not adequate grounds for us now to declare it altogether bad. At most they are entitled to equality of treatment, and in the absence of some definite and authorative ruling by the courts of the State, we will not assume that, upon a proper showing, this will be denied. The record fails to disclose that Hendrick had complied with the laws in force within the District of Columbia in respect of registering motor vehicles and licensing operators, *or that he applied to the Maryland Commissioner for an identifying tag or marker—prerequisites to a limited use of the highways without cost by residents of other States under the plain terms of Section 140A. He cannot therefore set up a claim of discrimination in this particular. Only those whose rights are directly affected can properly question the constitutionality of a state statute, and invoke our jurisdiction in respect thereto.*" (Citing numerous decisions of this and other Courts.)

The case of *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, 59 L. ed. 364, involved the classification of employers and employes created by an act of the State of Ohio, and providing that companies employing five or more employes and not taking advantage of the provisions of the act, are deprived of the defenses of the negligence of fellow servants, the defense of assumed risk, and the defense of contributory negligence; while employers of less than five employes might avail themselves of such defenses in damage cases involving personal injuries. It is claimed that this classification was a discrimination and afforded no equal protection under the terms and provisions of the Fourteenth Amendment to the Constitution of the United States.

The Court, in upholding the statute and denying the contention of discrimination and arbitrary classification of employers and employes, also discussed the right of appellant to maintain the statute. Mr. Justice Day, speaking for the Court, used the following language:

> "Much of the argument is based upon the supposed wrongs of the employe, and the alleged injustice and arbitrary character of the legislation here involved, as it concerns him alone, contrasting an employe in a shop with five employes with those having less. *No employe is complainnig of this act in this case. The argument based upon such discrimination, so far as it affects employes by themselves considered, cannot be decisive; for it is the well-settled rule of this Court that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of.*" (Citing numerous decisions of this Court.)

The case of *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 66 L. ed. 239, *supra*, involved the right of a corporation to engage in business in the State of Kentucky under a statute in effect in that State requiring certain acts to be performed as a condition precedent to conducting business in that State, by a foreign corporation. It was contended upon appeal that the statute was unconstitutional and in violation of the commerce clause of the Constitution of the United States. This Court in an opinion by Mr. Justice Van Devanter, after citing the two methods by which causes of action may be appealed from State Courts to this Court, added the language:

"Besides a litigant can be heard to question a statute's validity only when and so far as it is being or about to be applied to his disadvantage."

In the recent case of *Liberty Warehouse Co.* v. *Burley Tobacco Growers Co-operative Assn.*, 72 L. ed. 294, *supra*, this Court, in discussing the rights of parties attacking statutory provisions upon constitutional grounds, in an opinion by Mr. Justice McReynolds, said:

"In order to prevail here the warehouse company must show that enforcement of the challenged judgment would deprive it—not another—of some right arising under the Constitution or laws of the United States properly asserted below." (Citing cases *supra* and others.)

The case of *Rosenthal* v. *New York*, 226 U. S. 260, 57 L. ed. 212, *supra*, involved the constitutionality of a statute of that State making it a criminal offense for a dealer in or collector of junk, metals or second-hand materials to buy or receive any stolen wire, cable, copper, lead, solder, iron or brass used by or belonging to a railroad, telephone, telegraph, gas or electric light company, without making diligent inquiry for the purpose of ascertaining whether the person selling or delivering it has a legal right to do so. The act was contested under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States for the reason that the Legislature had failed to extend the protection of the act to other kinds of property when owned by the manufacturers of equipment for railroads, telephone and telegraph lines, as well as when

owned by the companies operating such lines; or the failure to include the owners of blast furnaces and brass foundries or other classes who are liable to loss by theft of articles of like kind. The Court, in disposing of this contention in its opinion by Mr. Justice Pitney, in discussing the right of appellant to raise the question involved, held that the fact that the act had not included all classifications of properties which might be susceptible to loss of the kind included in the statute, did not afford any footing for an attack by plaintiff in error upon the constitutionality of the act, for the reason that he does not bring himself within any of the classes that according to the argument, are peculiarly susceptible to loss of the kind that the statute is designed to prevent, nor does he show that he has suffered any injury by reason of the failure of the Legislature to extend the protection of the act to other classes of owners. (Citing numerous other decisions of this Court.)

The case of *Hooker* v. *Burr,* 194 U. S. 415, 48 L. ed. 1046, involved the rights of a purchaser of property at a foreclosure sale under the terms of a mortgage against the contention that the contract was impaired by changes in the law subsequent to the execution of the mortgage, but prior to the sale of the property with respect to the time of redemption and the rate of interest payable in order to redeem. The Court in its opinion by Mr. Justice Peckham, and in discussing the right of those affected to raise the constitutional question, did so in the following language:

"We have lately held (therein following a long line of authorities) that a party insisting upon the invalidity of a statute as violating any constitutional provision, must show that he may be injured by the unconstitutional law before the courts will listen to his complaint. *Tyler* v. *Registration Judges,* 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206; *Turpin* v. *Lemon,* 187 U. S. 51, 47 L. ed. 70, 23 Sup. Ct. Rep. 20. If instead of showing any injury plaintiff shows that he cannot possibly be injured, he cannot of course ask the interference of the court."

The case of *Clark* v. *Kansas City,* 176 U. S. 114, 44 L. ed. 392, is one of the leading decisions of this Court dealing with the question of the right of a party to raise constitutional questions respecting discrimination and unequal protection under the Fourteenth Amendment to the Constitution of the United States. The decision involved a statute of the State of Kansas and a city ordinance of the city of Kansas City pursuant to the statute, providing for the annexation of adjacent territory to cities of the first class in the State of Kansas. The statute provided for the annexation of certain territory which abutted cities of the first class having a population of 30,000 inhabitants or more, but excepted from its provision any "tract or tracts of land used for agricultural purposes when the same is not owned by any railroad or other corporation." The statute was upheld by the Supreme Court of the State of Kansas as against the contention that it violated the provisions of the Fourteenth Amendment, and was appealed to this Court. The opinion of the Court was by Mr. Justice Mc-

Kenna, and in the discussion of this principle the Court said:

> "Of the discrimination between owners of agricultural lands, the Supreme Court of Kansas said the defendants in error (plaintiffs here) cannot be heard to complain. Their lands are not agricultural lands, at least they do not allege them to be such lands; but on the contrary allege that parts of them are used for railroad purposes, and that the remaining portion are vacant and unoccupied lands, held and possessed for railroad purposes. Owning no agricultural lands, the defendants in error are not affected by the discrimination which the statute makes between the different classes of owners of such kinds of land, and they cannot therefore be heard to complain on that score."

The Court then quotes from the decision of the case of *Albany County Supers* v. *Stanley*, 105 U. S. 305, 26 L. ed. 1044, and from Cooley, Constitutional Limitations, 6th Ed., 196, where the Court and the author said:

> "The court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect and who has therefore no interest in defeating it."

In the case of *Williams* v. *Walsh*, 222 U. S. 415, 56 L. ed. 253, there was involved the constitutionality of a statute of the State of Kansas, making it a criminal offense to sell or deliver black powder for use in coal mines except in original sealed packages containing 12½ pounds of powder. The statute was attacked upon the grounds that it afforded unequal protection under the Fourteenth Amendment to the Constitution of the United States by one who

did not appear to have ever imported black powder from outside the State, and it was therefore held that he could not be heard to raise the question of the validity of the statute upon constitutional grounds. This Court in an opinion by Mr. Justice McKenna in disposing of this question, said:

> "There is another answer to the contention. The law cannot be declared invalid at the instance of one not affected by it, and as we have seen, there was no proof before the justice of the peace that plaintiff in error was an importer of powder."

The case of *Missouri, Kansas, Texas Railway Co. of Texas* v. *Cade*, 233 U. S. 642, 58 L. ed. 1135, *supra*, involved the constitutionality of a statute of the State of Texas, fixing and allowing a reasonable attorney's fee to the successful plaintiff in a suit upon a claim against any person or corporation doing business in this State, for personal services, labor performed or for material furnished or for overcharge on freight or express, or for any claim for loss or damaged freight or for stock killed or injured. The law was attacked upon the ground that it was a violation of the commerce clause of the Federal Constitution. This Court, in its opinion by Mr. Justice Pitney, said with respect to this contention:

> "So far as the present attack is founded upon the commerce clause and the act to regulate commerce, it is sufficient to say that the judgment under review was not based upon a claim arising out of interstate commerce, and hence plaintiff in error does not bring itself within the class with regard to whom it claims the act

in this respect is repugnant to the Constitution and Laws of the United States." (Citing numerous decisions of this and other Courts.)

The case of *Interstate Busses Corp.* v. *Holyoke St. Ry. Co.*, 273 U. S. 45, 71 L. ed. 530, *supra*, which is a comparatively recent decision of this Court, involved a statute of the State of Massachusetts requiring operators of motor vehicles, and affording a similar service to that supplied by a railway company between fixed and regular termni, to first secure a license authorizing it to engage in such a business. The business of appellant in that case was both interstate and intrastate. No license was required of interstate operators and defendant had never applied for or secured under the statute, a license authorizing it to operate in any wise. The street railway company sought to enforce the terms and provisions of the statute by causing appellant's employes to be arrested and prosecuted for violation of the statute. Appellant then sought a temporary restraining order in the United States District Court for the District of Massachusetts, and upon trial the bill of complaint was dismissed and the case was then appealed to this Court. This Court, in an opinion by Mr. Justice Butler, in disposing of the contentions that the statute violated the Federal Constitution, did so in the following language:

"The terms of the act are not arbitrary or unreasonable. Appellant has not applied for and does not show that it is entitled to have a license from the local au-

thorities or certificate of public necessity and convenience from the department. Plainly, it has no standing to attack the validity of the statute as a violation of the due process clause."

In the case of *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 545, 58 L. ed. 719, *supra,* this Court, in an opinion written by Mr. Justice Pitney, in disposing of the contention that an act of the State of Pennsylvania is violative of the Constitution of the United States in prescribing the protection to be afforded employes in coal mines of that State, and particularly discussing the right of litigants to raise constitutional questions, said:

> "We may once more repeat what has been so often said, that one who would strike down a state statute as violative of the Federal Constitution, must show he is within the class with respect to whom the act is unconstitutional, and must show that the alleged unconstitutional feature injures him and so operates as to deprive him of rights protected by the Federal Constitution. *Southern R. Co.* v. *King,* 217 U. S. 524, 54 L. ed. 868, 30 Sup. Ct. Rep. 594; *Standard Stock Food Co.* v. *Wright,* 225 U. S. 540, 550, 56 L. ed. 1197, 1201, 32 Sup. Ct. Rep. 784; *Rosenthal* v. *New York,* 226 U. S. 260, 271, 57 L. ed. 212, 217, 33 Sup. Ct. Rep. 27."

This contention was dealt with by the Supreme Court of the State of Oklahoma in the case of *Choctaw Cotton Oil Co. et al.* v. *Corporation Commission of Oklahoma et al.,* 247 Pac. 390, which is a companion case to the one now under consideration here. Justice Harrison, in discussing the contention that the provision of the statute is unconstitutional and invalid in that it authorizes the Corporation

Commission to deny petitioners equal protection under the law and to take their property without due process of law as was contended in that case and as is contended here, said:

> "The contention being that the foregoing proviso denies petitioners of equal protection under the law and takes their property without due process of law, the question necessarily arises: *What property rights are taken from petitioners by licensing another gin under the foregoing proviso? What rights of any kind could the licensing of another gin affect?* It does not destroy the property of petitioners nor prevent the free operation of their gins. The only right which could be affected by such a license is the right of petitioners to operate their gin without competition. A right which is not secured to them either by the State or Federal Constitution; hence the contention as to taking their property without due process of law cannot be sustained. Neither can the contention as to their being denied equal protection under the law be sustained."

The general rule with respect to the interest essential to the raising of constitutional questions, is stated in Ruling Case Law, Vol. 6, page 89, paragraph 87, as follows:

> "Before a law can be attacked by any person on the ground that it is unconstitutional, he must show that he has an interest in the question in that the enforcement of the law would be an infringment on his rights. One who is not prejudiced by the enforcement of an act of the Legislature cannot question its constitutionality or obtain a decision as to its invalidity on the ground that it impairs the rights of others."

Applying this principle to the case now before the Court, nowhere in the record is it claimed by appellant that

he has been denied anything whatsoever at the hands of the Corporation Commission of the State of Oklahoma *under the statute complained of.* Upon the contrary, the pleadings (R. 1), as well as the stipulation (R. 61), disclose that appellant has for a number of years held a license authorizing him to operate a cotton gin in the city of Durant, and that he has operated said plant, and so far as the record discloses, intends to operate it in the future.

In order for appellant to be heard to complain as to the constitutionality of the statute under consideration, we contend that he must have applied for a license under the general provision of the statute and have been subjected to some discrimination or some unequal burden in the disposition of that application as a condition precedent to his complaining in the Federal Court as against the constitutionality of said statute. But the facts disclose that he has been denied nothing, has suffered nothing, and as pointed out by the decision of the Supreme Court of the State of Oklahoma, the only objection which he can reasonably urge against the licensing of co-operative gins under the provision of the statute is that he fears competition.

Proposition II.

Appellant, under Proposition I of his Argument and Authorities, asserts that:

> **"Appellant's right to maintain and operate a gin is a franchise or a property right in the nature of a franchise."**

He then asserts that the grant of the right to operate a gin can be secured from the sovereign alone, and that it is essential and permits the holder to engage in a business which he could not engage in without the grant. This contention was also made before the Court composed of the three judges, and was disposed of by the Court (R. 29) in the following language:

> "As to whether the complainant operates his gin under a franchise or license that is not essential to determine. In Oklahoma perpetual and exclusive franchises are prohibited. Oklahoma Constitution, Art. 2, Sec. 32; Art. 5, Sec. 51, and Art. 18, Sec. 7. In *Boise City Artesian Hot & Cold Water Co.* v. *Boise City* (9th C. C. A.), 123 Fed. 252, it is held that an ordinance granting right to lay and repair water pipes in the streets and alleys of the city, but without fixing any term for the privilege, is a grant of a license only, revocable at the will of the city, since it had no power to grant a perpetual franchise, and that appears to be the rule supported by the weight of authority. It is assumed that complainant may maintain this action under said status if the proviso assailed by him is void, but conclude that he did not have such a vested right as to prevent the passage of said proviso if it does not amount to an arbitrary or unreasonable classification."

Appellant, in support of his proposition that the right

to maintain and operate a gin is a franchise or a property right in the nature of a franchise, cites the following cases:

—*McPhee et al.* v. *Union Pacific Railway,* 158 Fed. 5, 10.

New Orleans Gas Co. v. *Louisiana Light Co.,* 115 U. S. 650, 659, 6 Sup. Ct. 252, 29 L. ed. 516.

Walla Walla v. *Walla Walla Water Co.,* 172 U. S. 1, 9, 19 Sup. Ct. 77, 43 L. ed. 341.

Denver v. *City Cable Co.,* 22 Colo. 565, 45 Pac. 439.

Donahue v. *Morgan,* 24 Colo. 389, 390, 400, 50 Pac. 1038.

Thomas v. *Grand Junction,* 13 Colo. App. 80, 81, 65 Pac. 665.

City of Denver v. *Denver Union Water Co.* (Colo.), 91 Pac. 918, 919.

Morgan v. *Lee,* 93 U. S. 217, 213.

California v. *Pacific R. R. Co.,* 127 U. S. 1, 40.

Owensboro v. *Cumberland T. & T. Co.,* 230 U. S. 58, 65.

Trustees, etc., of South Hampton v. *Jessup,* 56 N. E. 538.

State v. *Country Club,* 173 S. W. 570.

A careful study of these decisions, however, disclose that none of them can in any wise be construed as supporting the proposition announced. In none of the decisions is any right involved in any respect similar to the right held by a cotton ginner under the statutes of the State of Oklahoma. They deal with the rights of gas, electric, telephone

and water companies to use and occupy streets and public places in the conduct of their business.

In the case of *McPhee et al.* v. *Union Pacific Railway,* 158 Fed. 5, 10, *supra,* a distinction is drawn between franchise rights and the rights under mere licenses. However, in that case a franchise had been refused at an election held in the city of Denver, and thereupon the City Council proceeded by ordinance to grant to the railway company a revocable permit to occupy and use the streets. The Court held that this was a license instead of a franchise.

The case of *New Orleans Gas Co.* v. *Louisiana Light Co.,* 115 U. S. 650, *supra,* which involved an exclusive franchise for the sale and distribution of gas, does not define either a license or franchise, but deals with the right of a State to grant exclusive franchises, and holds that when such franchise is granted it is a contract which may not be abrogated even by the State.

The case of *Walla Walla* v. *Walla Walla Water Co.,* 172 U. S. 1, involved substantially the same question as was involved in the New Orleans Gas Co. case, except that it involved the right of the city itself to issue bonds to construct and operate a waterworks system in competition with the holder of an exclusive franchise previously granted by the city.

The case of *Denver* v. *City Cable Co.,* 22 Colo. 565, 45 Pac. 439, *supra,* involved the right of the city of Denver

to impose additional onerous burdens which were in no way connected with or related to the operation of the street railway, upon the street railway, holding the franchise, in addition to those contained in the franchise. It was held that such an imposition was invalid as impairing the obligations of a contract.

In the case of *Donahue* v. *Morgan,* 24 Colo. 389, 50 Pac. 1038, *supra,* there was involved the rights of a holder of a franchise in a city which was later consolidated with two others as against one of the other towns in connection with the ownership and operation of its own municipal plant, with particular respect to extensions and improvements of service. The question was the infringment or impairment of the contract, and did not involve the question here under consideration.

The case of *City of Denver* v. *Denver Union Water Co.,* 91 Pac. 918, which was a rate case, involved the franchise requirement that the water company, after five years of operation under the rate fixed by the franchise, was required to apply the average rate effective in Chicago, St. Louis and Cincinnati, and it was held that such a requirement was inoperative and invalid.

The case of *Morgan* v. *Louisiana,* 93 U. S. 219, *supra,* there was involved the question of whether or not the transfer and sale of public service property exempt from taxation by statute as to original grantee, also transferred the

immunity from taxation to transferee. It was held that such an immunity was a personal privilege and did not run with the franchise.

The case of *Owensboro* v. *Cumberland T. & T. Co.*, 230 U. S. 58, *supra*, involved the rights of a telephone company which had secured by city ordinance the authority to erect its poles, wires, etc., in the streets and to connect telephone users therewith as against a later ordinance requiring the company to remove its facilities from the street or be subjected to a removal of same at the hands of the city authorities unless the company purchase from the city a new franchise. It was held that the original order granted a franchise which could not be impaired by a later ordinance such as was proposed.

The case of *Trustees, etc., of South Hampton* v. *Jessup*, 56 N. E. 538, involved the right conveyed by the board of trustees of a municipality to defendant to construct a roadway and draw bridge across a waterway, and the right of the trustees later to enjoin the construction on account of the character of roadway being constructed, notwithstanding the resolution granting the right was silenced thereon; grantee claiming his right to be a franchise irrevocable after acceptable and partial execution. It was held that this right was a franchise.

In the case of *State* v. *Country Club*, 173 S. W. 570, a Texas case, involved the right of the State to enjoin club

owners from selling intoxicating liquors without license, and in which the Court referred to the right of the holder of a whisky license as a holder of a franchise. The language of the Court in that regard was purely dictum and the decision is in no wise applicable.

The case of *Boise Artesian H. & C. Water Co.* v. *Boise City*, 230 U. S. 84, 57 L. ed. 1400, cited by appellant, involved no such right as is here under consideration, but did involve a municipal grant of the right to occupy the city streets with the pipes of a water distributing system, and the right thereafter of the city to impose additional burdens in the way of payment to the city of a monthly rental for such use and occupation of the streets. This Court held that this grant, when accepted, is not a mere revocable license, but a substantial property right, which could not be impaired by imposing additional burdens after its acceptance.

The case of *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 37 L. ed. 463, involved an act of Congress authorizing the Secretary of War to condemn and appropriate property of the Monongahela Navigation Company, and this Court held that the franchise of the navigation company constituted property which could not be taken for public use without just compensation. The question involved was the taking of the physical property as well as the franchise from the navigation company in its

entirety, and did not involve the exclusive right to operate property as against the right of the State to grant other licenses or franchises.

The case of *Charles River Bridge Co.* v. *Warren Bridge et al.*, 11 Peters 420, upheld the right of the State of Massachusetts in granting a competitive franchise to the Warren Bridge Company, which, in effect, destroyed the business of the Charles River Bridge Company. In this case, however, Chief Justice Teney pointed out at considerable length that the power of the State to grant franchises and to exercise the right of police power, may be so used as to destroy the value of a franchise formerly granted to another corporation. In that case this Court, in dealing with the rights of competitive concerns holding franchises, said:

> "The relative position of the Warren bridge has already been described. It does not interrupt the passage over the Charles River bridge nor make the way to it or from it less convenient. *None of the faculties or franchise granted to that corporation have been revoked by the Legislature; and its right to take the tolls granted by the charter remains unaltered. In short, all the franchises and rights of property enumerated in the charter and there mentioned to have been granted to it, remain unimpaired. But its income is destroyed by the Warren bridge, which, being free, draws off the passengers and property which would have gone over it, and renders their franchise of no value. This is the gist of the complaint. For it is not pretended that the erection of the Warren bridge would have done them any injury or in any degree affected their right of property if it had not diminished the amount of their tolls. In order, then, to entitle them-*

selves to relief, it is necessary to show that the Legislature contracted not to do the act of which they complain; and that they impaired, or in other words, violated that contract by the erection of the Warren bridge."

The case of *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, is another case involving the condemnation of property and franchise of a public service concern, to-wit, a water company, incident to public ownership thereof. This Court held that the franchise held by the Long Island Water Supply Company was not exclusive and that the exclusiveness incident to its right might at any time be taken from it by the Legislature or by local authorities acting under legislation. The Court said:

"The contract in terms contained no words of exclusion. It gave to the company the privilege of laying its mains in the streets of the town and contained a covenant on the part of the town to pay certain hydrant rental; but grants from the public are strictly construed in favor of the public, and grants of a privilege are not ordinarily to be taken as grants of an exclusive privilege." (Citing *Charles River Bridge Co.* v. *Warren Bridge*, 11 Pet. 420, *supra; Washington & Turnp. Co.* v. *Maryland*, 70 U. S. 3 Wall. 210; *Stein* v. *Beinville Water Supply Co.*, 141 U. S. 67; *Hamilton Gas Light & C. Co.* v. *Hamilton*, 146 U. S. 258; *Syracuse Water Co.* v. *Syracuse*, 116 N. W. 167, 5 L. R. A. 546.)

The case of *Beinville Water Supply Co.* v. *Mobile*, 186 U. S. 212, involved the power of the Alabama Legislature to revoke the exclusive features of a franchise held by the water company by the granting of an additional charter authorizing the holder to engage in the distribution of

water for public consumption in the city of Mobile. The authority of the Legislature was upheld by this Court in an opinion by Mr. Justice Brewer, the Court holding that the franchise was not exclusive and that the State was authorized to charter and grant franchises to others desiring to engage in that business. In discussing the relationship of the two holders of franchises, and the rights of the State, the Court said:

> "It has been held that the right of revocation or amendment carries with it no right to appropriate the tangible property belonging to the corporation. As said by Chief Justice Waite in speaking of the power of amendment in *Sinking Fund Cases*, 99 U. S. 700, 720; *Union P. R. Co.* v. *United States*, 25 L. ed. 496: 'All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made.' Nothing of this nature was, however, attempted by this legislation. The plaintiff was left in undisturbed possession of its tangible property, so we need not stop to consider what protection could be afforded if the attempt had been made to take away its property."

In the case of *Bartlesville Elec. & Power Co.* v. *Bartlesville Int. Ry. Co.*, 26 Okla. 453, there was involved the right of the holder of a legally granted franchise as against a competing concern which attempted without authority from the city, to use the streets, lanes and public places of the city for the purpose of erecting a system of poles and wires for supplying the city of Bartlesville and its inhabitants with electric light and power in competition to

the holder of the franchise. This case upon its face discloses its entire inapplicability to the principles here under discussion. However, the Court in its opinion, in discussing the rights of the two concerns, also discusses the status which the parties would occupy had defendant been granted legally the franchise or permit to engage in business in competition to plaintiff. The Court says:

> "When plaintiff accepted its franchise, it did so subject to the power of the municipality to grant to other persons or corporations similar franchises, and with the knowledge that it might be compelled to exercise its rights under its franchise with others exercising similar rights. If, by the competition of rival companies to whom the use of the streets and public grounds has been granted by the municipality, plaintiff is rendered unable to discharge the obligations of its contract to furnish the city and its inhabitants with light and power at stipulated prices, except at a financial loss to it, plaintiff cannot complain, for it must be held to have contemplated such condition might arise and to have agreed thereto, when it accepted the franchise; but such cannot be said of the defendant, who unlawfully occupies the streets and public grounds of the city in competition with plaintiff."

The case of *Henry et al.* v. *Bartlesville Gas & Oil Co.*, 33 Okla. 473, as in the case of *Bartlesville Electric & Power Co.* v. *Bartlesville Int. Ry. Co.*, 26 Okla. 453, *supra*, involved the right of the Bartlesville Gas & Oil Company, a corporation, holding a valid franchise granted by the city of Bartlesville, as against an individual, to-wit, R. L. Henry, the holder of a competing franchise also regularly granted by the city of Bartlesville, and in which the court

held that the franchise held by Henry and his assignees was void for the reason that Section 4846, Snyder's Compiled Laws 1909, by implication, limits the right to corporations only, and does not authorize the granting of a franchise to an individual.

As to the distinction between a franchise and a license, it appears to us that the most clear distinction of any which we have been able to find in the decisions of the various courts, is found in the decision of the Nebraska Supreme Court in the case of *Omaha & C. B. Street Railway Co.* v. *Omaha,* 208 N. W. 123, P. U. R. 1926D, page 629. In that case the court was considering a very similar provision to that which is being considered in this case. The City of Omaha had passed and approved an ordinance regulating auto busses as common carriers of persons within the city of Omaha. The ordinance provided, among other requirements, for investigation of applicants seeking to engage in the business, either as proprietors or as drivers, providing rules to be observed by those engaging in such employment; confines operations of licensees to routes having fixed termini; restricts charges for services to a definite sum; *requires as a condition precedent to commencement of business the filing of a good and sufficient bond, conditioned for the payment of all damages sustained by any person due to negligence committed in the operation of the busses; prohibiting under penalties any person from engaging in the business without compliance*

with the terms of the ordinance, including a written license, by its terms subject to revocation. In discussing the distinction between a franchise and a mere license, the Court in its opinion said:

> "It is to be remembered that the power to create and confer a right not theretofore existing is distinct and different from permitting under proper regulation the exercise of power possessed by the citizens generally of common right. Is, therefore, the carriage of persons in auto busses over the public streets of Omaha by common carriers exercised solely pursuant to grant, or is it, in the absence of legislation, the exercise of a common right? In other words, is the ordinance a grant or a regulation?
>
> "The right to use the public highways of the State by the ordinary and usual means of transportation is common to all members of the public without distinction, and extends to those engaged in the business of carrying passengers or freight for hire by such ordinary and usual means of transportation, as well as to individuals pursuing a strictly private business, subject to the power of the State, by legislative enactment, to impose reasonable and impartial regulations upon such use, which power may be delegated by the Legislature to the governing bodies of municipal corporations. 13 R. C. L. 251-255; *White Oak Coal Co.* v. *Manchester,* 109 Va. 749 (64 S. E. 944), 132 Am. St. Rep. 943; *Bogue* v. *Bennett,* 156 Ind. 478 (60 N. E. 143), 83 Am. St. Rep. 212; *Commonwealth* v. *Stodder,* 2 Cush. (Mass.) 562, 48 Am. Dec. 679); *Sumner County* v. *Interurban Transp. Co.,* 141 Tenn. 493 (213 S. W. 412), 5 A. L. R. 765; *Cicero Lumber Co.* v. *Cicero,* 176 Ill. 9 (51 N. E. 758), 42 L. R. A. 696, 68 Am. St. Rep. 155; *Dent* v. *Oregon City,* 106 Ore. 122, 211 Pac. 909.
>
> "It follows, therefore, that the terms of the ordinance in controversy in this action must be construed not as a grant, but as a regulation of a right pre- exist-

ing. This conclusion disposes of plaintiff's contention that the ordinance in question is one of the class described as 'any ordinance or resolution, granting, extending, changing, or modifying the terms and conditions of a franchise.' Comp. St. 1922, Section 3719."

Also in the case of *McCutcheon* v. *Wozencraft* (Texas Civ. App..), 230 S. W. 733, it was held in a case involving similar facts and principles:

"The rights to run over the streets of a city to be granted to motor bus operators under the terms of proposed ordinances held not to come within the meaning of the term 'franchise' as used in the Dallas City Charter, Section 8, subdivision 2, giving the city power to confer on any person or corporation franchises or rights to use the property of the city to furnish any general public service."

There are also cited in support of this principle, the following cases:

—*Ex parte Dickey,* 76 W. Va. 576, P. U. R. 1915C 93, 85 S. E. 781, L. R. A. 1915F 840.

Burgess v. *Brockton,* 235 Mass. 95, 126 N. E. 456.

Dallas v. *Gill* (Tex. Civ. App.), 199 S. W. 1141.

Lindsley v. *Dallas Consol. Street R. Co.* (Tex. Civ. App.), 200 S. W. 207.

Peters v. *San Antonio* (Tex. Civ. App.), 195 S. W. 989.

Boise City Artesian Hot & Cold Water Co. v. *Boise City,* 59 C. C. A. 236, 123 Fed. 232.

Grand Rapids G. H. & M. R. Co. v. *Stevens,* 219 Mich. 332, 189 N. W. 2.

In 12 Ruling Case Law, page 178, is discussed the dis-

tinction between franchise and license, or easement, and it is said with respect thereto:

> "A license has been generally defined as a mere personal privilege to do acts upon the land of the licensor, of a temporary character, and revocable at the will of the latter unless, according to some authorities, in the meantime expenditures contemplated by the licensor when the license was given have been made. A franchise, however, is neither personal nor temporary; nor is it revocable."

In this connection we may be permitted to suggest that the statute heretofore set out clearly indicates that the right to operate a cotton gin under this statute is a personal right, for the reason that the applicant must appear and must make a showing that he is a suitable person both with respect to character and ability, financial and otherwise, to carry on the project under consideration. We may observe also that the license granted was not assignable without permission and approval of the Corporation Commission of the State of Oklahoma, and that licenses granted to co-operative concerns, *is specifically limited to the operation of gins co-operatively, and may not, without the Corporation Commission's consent, be operated otherwise.*.

Also in 12 Ruling Case Law, at page 197, there is discussed the rights of a holder of a franchise, and as to what constitutes an exclusive grant it is said with respect to franchises:

"The grantee takes nothing in that respect by inference. Accordingly, where the grant is not by its terms exclusive, the Legislature is not precluded from granting a similar franchise, or authorizing the construction of a rival way or structure, which may greatly impair, or even totally destroy, the value of the former grant, and such damage is not the taking of a former franchise which entitles its owner to compensation." (Citing *Dyer* v. *Tuskalooso Bridge Co.*, 2 Port. (Ala.) 296, 27 Am. Dec. 655; *Indianapolis Cable St. R. Co.* v. *Citizens St. R. Co.*, 127 Ind. 369. 24 N. E. 1054, 26 N. E. 893, 8 L. R. A. 539; *Clarksville, etc., Turnpike Co.* v. *Montgomery County*, 100 Tenn. 417, 45 S. W. 345, 58 L. R. A. 155.)

As an example of the applicability of this principle, the text cites the leading case in this country of *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 9 U. S. (L. ed.) 773.

In 17 Ruling Case Law, at page 476, under the head of "Constitutionality of License Tax Generally," and the "Obligation of Contracts in General," it is said:

"A license is not a contract between the State and the licensee and is not property in any constitutional sense." *Gibbons* v. *Ogden*, 9 Wheat 1, 6 U. S. (L. ed.) 23; *Union Pass. R. Co.* v. *Philadelphia*, 101 U. S. 528, 25 U. S. (L. ed.) 912; *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365, 2 S. Ct. 257, 27 U. S. (L. ed.) 419; *Stone* v. *Fritts*, 169 Ind. 361, 82 N. E. 792, 14 Ann Cas. 295, 15 L. R. A. (N. S.) 1147; *Lowell* v. *Archambault*, 189 Mass. 70, 75 N. E. 65, 1 L. R. A. (N. S.) 458; *Simmons* v. *State*, 12 Mo. 268, 49 Am. Dec. 131; *Wallace* v. *Reno*, 27 Nev. 71, 73 Pac. 528, 103 A. S. R. 747, 63 L. R. A. 377; *Portland* v. *Cook*, 48 Ore. 550, 67 Pac. 772, 9 L. R. A. (N. S.) 733; *Littleton* v. *Burgess*, 14 Wyo. 173, 82 Pac. 864, 2 L. R. A. (N. S.) 631.

In the same paragraph (paragraph 5) it is also said:

> "Following the general principle that a license is not a contract, it is clear that it does not in itself create any vested right, or permanent right, and that free latitude is reserved by the Legislature to impose new or additional burdens on the licenses, or to alter the license or to revoke or annul it. And this is the general rule notwithstanding the expenditure of money by the licensee, in reliance thereon, and regardless of whether the term for which the license was given has expired."

Volume 6, R. C. L., page 482, Section 481, states the principle of the interest possessed by one holding a license to engage in a business, as follows:

> "No person can acquire a vested right to continue, when once licensed, in a business, trade or occupation which is subject to legislative control and regulation under the police power. Accordingly it is held that statutes prescribing the qualifications of persons engaged in professions requiring them to take out a license, in no manner impair any vested right as respects those who are practicing in the State prior to the passing and going into effect of such statutes. For example, due process of law is not denied in requiring an examination and license before one can engage in the occupation of an architect. Similarly it is clear that the State, by permitting the keeping of pool rooms, cannot be said to give an assurance that they may continue, and hence it is not estopped from subsequently prohibiting their operation. The mere fact that an enactment under the police power strikes down a business of profit or renders property of little value and of no use, does not give any basis to a contention that it has been taken without due process of law.
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> "*State* v. *Havorka,* 100 Minn. 249, 110 N. W. 870, 10 Ann. Cas. 398, 8 L. R. A. (N. S.) 1272; *Reetz* v. *Mich.,* 188 U. S. 805, 23 S. Ct. 390, 47 U. S. (L. ed.) 563;

Collins v. *Texas,* 223 U. S. 288, 32 S. Ct. 286, 56 U. S. (L. ed.) 439; *State* v. *Gravett,* 65 Ohio St. 289, 62 N. E. 325, 87 A. S. R. 605, 55 L. R. A. 791; *State* v. *Carlisle,* 28 S. D. 169, 132 N. W. 686, Ann. Cas. 1914B 395, and note; *Klafter* v. *State Board of Examiners of Architects,* 259 Ill. 15, 102 N. E. 193, Ann. Cas. 1914B 1221, 46 L. R. A. (N. S.) 532; *Burlingame* v. *Thompson,* 74 Kan. 393, 86 Pac. 449, 11 Ann. Cas. 64."

In the same volume, Ruling Case Law, page 483, Section 483, it is again said:

"No one would venture to question the general proposition that a corporation whose property is devoted to a public use, as is that of a carrier, is subject to reasonable regulation by the State. While it is entitled to the protection of the guaranty of due process of law, the nature of its business divests its property of some of the protection to which it would otherwise be entitled. The guaranty of due process of law protects such a corporation in two different aspects, when the rates to be charged by it are sought to be regulated. In the first place it is entitled to notice and an opportunity to be heard before a commission which is to take action with reference to its charges, and in the second place it is entitled to a fair return for the use of its property, and the Legislature cannot, consistently with the guaranty of due process of law, deprive it of this right."

(Citing: See par. 467, see Carriers, Vol. 4, 607; *Chicago M. & St. P. R. Co.* v. *Minn.,* 134 U. S. 418, 10 S. Ct. 462, 702, 33 U. S. (L. ed.) 970 And see Carriers, Vol 4, p. 624. *Reagan* v. *Farmers Loan & Trust Co.,* No. 1, 154 U. S. 362, 14 S. Ct. 1047, 38 U. S. (L. ed.) 1014.)

Also in 17 R. C. L. at page 474, in defining the nature and purpose generally of a license, it is said:

"In its specific sense, to license means to confer on

a person the right to do something which otherwise he would not have the right to do. A license is in the nature of a special privilege, and not a right common to all; and it is often required as a condition precedent to the right to carry on business or to hold certain classes of property within the jurisdiction. *It is not a property right or a contract.* Implying a privilege, it cannot possibly exist with reference to something which is a right, free and open to all." * * *

The same work, at page 475, paragraph 4, says:

"A license being a personal privilege, cannot, as a general rule, be communicated or assigned to another. * * *"

In this connection the language of the Supreme Court of the State of Oklahoma, in the case of *Choctaw Cotton Oil Co. et al.* v. *Corporation Commission of Oklahoma et al.*, 247 Pac. 390, *supra,* in deciding the companion case to the one now under consideration, is particularly applicable. The court in deciding the case and in discussing the property rights involved, used the following language:

"The contention being that the foregoing proviso denies petitioners of equal protection under the law and takes their property without due process of law, the question necessarily arises, what property rights are taken from petitioners by licensing another gin, under the foregoing proviso? What rights of any kind could the licensing of another gin affect? It does not disturb the property of petitioners, nor prevent the free operation of their gins. The only right which could be affected by such license is the right of petitioners to operate their gin without competition, a right which is not secured to them either by the State or Federal Constitutions; hence the contention as to taking their property without due process of law can-

not be sustained. Neither can the contention as to their being denied equal protection under the law be sustained."

In the case of *In re. Farmers Co-operative Gin at Bochito, Oklahoma,* 122 Okla. 115, 251 Pac. 729, the Court adopted this same principle, and decided the case without an opinion, for the reason that the opinion in the former case just quoted from, ruled the case then under consideration.

The Constitution of the State of Oklahoma contains two provisions which are particularly applicable in connection with this contention. Section 32 of Article 2 provides:

> "Perpetuties and monopolies are contrary to the genius of a free government and shall never be allowed; * * *."

Section 51 or Article 5 provides:

> "The Legislature shall pass no law granting to any association, corporation or individual any exclusive rights, privileges or immunities within this State."

Upon this question we also call attention to Pond on Public Utilities (3rd Ed.). Section 203 lays down the principle in the following language:

> "Impairment of Franchise Rights by Competition Not Prohibited. That the effect of contracting with or creating another municipal public utility does not violate the contract rights or interests protected by the Constitution where the former company did not secure an exclusive right or franchise is well expressed in the case of *Revere Water Co.* v. *Winthrop,* 192 Mass. 455, 78 N. E. 497, 207 U. S. 604, 52 L. ed. 360, 28 Sup.

Ct. 253, decided in 1906 in the following language: 'This act was passed to enable the town to supply its inhabitants with water, and whether the public interests would be served by conferring such authority was for the Legislature to determine. It is manifest that if any independent system might be thus established, the defendant's property would be diminished in value, and its business perhaps destroyed by reason of the competition, but the company under St. 1882, p. 101, c. 142, by which it was incorporated, enjoyed no vested rights which gave it immunity from this contingency, or rendered such legislative action unconstitutional. Nor is legislation of this nature an appropriation of private property for a public use without due process of law under the Fourteenth Amendment to the Federal Constitution.''

We therefore conclude that the nature of the right possessed by appellant under its license to operate a cotton gin, is clearly distinguishable from the right possessed by the holders of a franchise to occupy streets and public places granted by the sovereignty. We further contend that even though the right possessed by appellant is in the nature of a franchise, the legislative authority of the State of Oklahoma is empowered under the facts in this case to classify in a constitutional way co-operative organizations as was done in the case now under consideration, and that appellant would have no right to complain of such classification.

Proposition III.

Counsel for appellant, under their Proposition II, asserts:

"The right held by appellant to operate a gin will be protected by a court of equity."

The correctness of this proposition would depend entirely upon what is meant by protection. The right, privileges and property held by appellant under a license or franchise, will be protected where those rights are invaded in an unconstitutional manner, but as shown by the cases already cited under Proposition II, the right and privilege to operate free from competition will not be protected by a court of equity. Neither does the right of the holder of a franchise or license guarantee or protect such holder from the legal granting of additional franchises or license even though the effect of such granting of an additional license might result in damage to the original holder. The decisions cited by counsel under this proposition all hold to this effect without a single exception.

—*Owensboro* v. *Cumberland Tel. Co.*, 230 U. S. 58, 65.

Boise City v. *Boise City, etc., Water Co.*, 230 U. S. 84.

Charles River Bridge Co. v. *Warren Bridge Co.*, 11 Peters 420.

Bartlesville Electric Light & Power Co. v. *Bartlesville Interurban Ry. Co.*, 26 Okla. 453, 29 L. R. A. (N. S.) 77.

Tulsa St. Ry. Co. v. *Oklahoma Union Traction Co.*, 27 Okla. 339, 342, 343.

Henry v. *Bartlesville Gas & Oil Co.*, 33 Okla. 473, 478.

Melville Gas Light Co. v. *Vineland Light & Power Co.*, 72 N. J. Eq. 305.

Peoples Transit Co. v. *Henshaw*, 20 Fed. (2nd) 87.

Pomeroy's Equity Jurisprudence, Vol. 5, Secs. 2016, 2017.

Proposition IV.

Is appellant denied due process of law and equal protection of the laws?

In the outset we desire to state that if there is any possible method by which cotton gins operated co-operatively may be distinguished reasonably from the operation of the ordinary commercial cotton gin, then, in our opinion, the act must stand, regardless of the method or manner of the organization of the Durant Co-operative Gin Company. This is true for the reason that the act does not undertake to define what it takes to constitute a gin, co-operatively operated and maintained. In the discussion of this proposition, which we consider to be the major and controlling question in the case, we shall first refer to the decisions cited by counsel in support of his contention that the act is an arbitrary classification resulting in the deprivation of his clients of the equal protection of the law. After discussing those cases we shall then refer to such cases as we may have been able to find, which, in our opinion, will support the classification undertaken by the Oklahoma Leg-

islature, as well as the nature of the business of cotton ginning and its relative importance to the population of the State of Oklahoma.

Authorities of Appellant Reviewed.

The first case cited by appellant is the case of *Ex parte Virginia,* 100 U. S. 339. In this case there was involved the question of exclusion of colored persons from jury service. This Court properly held that this was a denial of the equal protection of the laws, and it is a fundamental principle in constitutional law that classification cannot be made upon the basis of color.

In the case of *Barbier* v. *Connolly,* 113 U. S. 27, and the case of *Soon Hing* v. *Crowley,* 113 U. S. 703, cited by appellant, there was involved an ordinance of the City of San Francisco with respect to the safeguards which should be thrown around the operation of laundries. In each of these cases the Court upheld the provisions of the ordinance, but called attention to the fact as quoted by counsel in their brief, that "no impediment shall be imposed to the pursuits of anyone except as applied to the same pursuits of others under like circumstances; that no greater burdens should be laid upon one than are laid upon others *in the same calling and condition.*"

In the case of *Yic Wo* v. *Hopkins,* 113 U. S. 356, cited, which was also a laundry case involving a city ordinance

of San Francisco, the Court held that on account of the showing that the ordinance was being directed particularly at the Chinese race of people, that unequal protection of the law was afforded. It is fundamental that legislation must not be classified upon citizenship.

In the case of *G. C. & S. F. Ry. Co.* v. *Ellis*, 165 U. S. 150, the State of Texas had imposed an attorney's fee, not to exceed $10.00 in addition to costs, upon railway corporations omitting to pay claims within a certain time after presentation, which did not apply to any other corporation or individual, and this was properly held to be a denial of the equal protection of the laws.

In the case of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, cited by counsel for appellant, there was involved the anti-trust act of the State of Illinois, but which act specifically exempted in the ninth section thereof, agricultural products or live stock while in the hands of the producer or raiser. It was pointed out in that case that the classification which exempted agricultural products and live stock products might result in the most vicious of all monopolies or combination in restraint of trads, and that therefore the provision was in violation of the Fourteenth Amendment to the Constitution of the United States. The Court, however, in its opinion by Mr. Justice Harlan, discusses at great length the principles which should enter into the matter of classification for legislative purposes. It is said, page 558:

"What may be regarded as a denial of the equal protection of the laws, is a question not always easily determined, as the decisions of this Court and of the highest courts of the States will show. It is sometimes difficult to show that a state enactment having its source in a power not controverted, infringes rights protected by the National Constitution. No rule can be formulated that will cover every case. But upon this general question we have said that the guaranty of the equal protection of the laws means '*that no person or class of persons shall be denied the same protection of the law which is enjoyed by other persons or other classes in the same place and under like circumstances.*'

* * * * * * * * *

"That no impediment should be interposed to pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than is prescribed for all like offenses."

In the case of *Cotting* v. *Kansas City Stockyards Company and State of Kansas,* 108 U. S. 79, the State of Kansas undertook to regulate stockyards both as to the manner of their operation and as to price to be charged for certain service rendered by the stockyards to their patrons. It based the regulation entirely upon the number of head of cattle, or hogs, or sheep handled for the preceding twelve months, providing that a stockyard handling not less than 100 head of cattle, or 300 head of hogs, or 300 head of sheep during the preceding twelve months shall be declared to be public stockyards and subject to the regulation. The act

was attacked upon the grounds that it violated the Fourteenth Amendment to the Constitution of the United States. It was held to violate that provision after distinguishing numerous cases which had held legislative classification not within the inhibition of this provision of the Constitution. However, the Court, in its opinion, clearly recognizes the right of the various States of the Union to classify legislative subjects and discusses their latitude in so doing. The Court in its opinion says:

> "So, again, exercising the undoubted right of classification, it may even happen that some classes are subjected to regulations, and some individuals are burdened with obligations which do not rest upon other classes or other individuals not similarly situated. License taxes are imposed upon certain classes of business, while others are exempt. *It would practically defeat legislation if it was laid down as a rule that a statute was necessarily adjudged invalid if it did not bring all within its scope, or subject all to the same burdens.* It would strip the Legislature of its inherent power to determine generally what is for the general interests, which interests may often be promoted by certain regulations affecting one class which do not affect another, certain burdens imposed on one which do not rest upon another."

The case of *Traux* v. *Raich*, 239 U .S. 33, an act of the State of Arizona of December 14, 1914, requiring every employer of more than five workers at any one time, "regardless of kind or class of work or sex of workers to employ not less than 80 per cent qualified electors or native-born citizens of the United States, or some subdivision thereof," was held to be in violation of the Fourteenth

Amendment to the Constitution of the United States as denying equal protection of the laws.

In the case of *Hayes* v. *Missouri*, 120 U. S. 68, the Court had under consideration a provision of the Missouri statute providing that in all capital cases, except in cities having a population of over 100,000 inhabitants, the State shall be allowed eight peremptory challenges to jurors, and in such cities shall be allowed fifteen. The defendant Hayes, being indicted in the criminal courts of St. Louis, a city of over 100,000 inhabitants, and having been convicted, attacked the act as being violative of the Fourteenth Amendment to the Constitution of the United States. This Court in an opinion by Mr. Justice Field, denied the contention and upheld the Missouri act as not being repugnant to the constitutional provision. The Court in its opinion, discussing this principle, said:

> "The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely required that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. * * * But legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." (Citing *Barber* v. *Connolly*, 113 U. S. 27.)

In the case of *Traux* v. *Corrigan*, 257 U. S. 312, 66 L.

ed. 254, there was involved a statute of the State of Arizona prohibiting interference by injunction between employers and employes in cases growing out of a dispute concerning terms or conditions of employment which, under the statute, would have been entirely proper in cases not involving disputes between employers and former employes. This statute was held to be in violation of the Fourteenth Amendment for the reason that the classification was based upon the relation of an employer, not to an employe, but to one who has ceased to be such in respect of torts committed by such employe on the business and the property right of the employer.

The case of *Southern Railway Co.* v. *Green,* 216 U. S. 400, 54 L. ed. 536, involved a franchise tax imposed by the State of Alabama upon foreign corporations, which had already come into the State in compliance with its laws and required property of a fixed and permanent nature upon which it had paid all taxes levied by the State prior to its subjection to the franchise tax, but did not impose such burden upon domestic corporations. The Court, in discussing the reasonableness of classification, disposed of the matter in the following language:

> "While reasonable classification is permitted without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the things in respect to which such classification is imposed; a classification cannot be arbitrarily made without any substantial basis."

The case of *A. T. & S. F. Ry. Co.* v. *Vosburg,* 238 U. S. 56, 59 L. ed. 1199, involved the constitutionality of a statute of the State of Kansas allowing a reasonable attorney's fee to a shipper who successfully sues a railway company for failure to furnish cars while no such allowance is made in favor of a railway company in the event of its successful prosecution of a suit brought by it under such statute against a shipper who has failed to use the cars promptly. The Court, distinguishing this case from the case of *Missouri, K. & T. R. Co.* v. *Cade,* 233 U. S. 642, 58 L. ed. 1135, sustaining a statute of the State of Texas, providing that if certain claims were not paid by the railway company within a limited time after presentation, suit might be instituted thereon, and if plaintiff obtained judgment for the full amount of the claim as presented, he should recover the amount claimed with costs, and in addition, a reasonable amount as attorney's fees; and in that case the Court held that the classification was constitutional and did not constitute a discrimination between different citizens or classes of citizens, since members of any and every class *may either sued or be sued,* holding it to be erroneous to test the classification as in the instant case, by its supposed relation to the object of securing adequate car service, because it really relates rather to the object of securing adequate prosecution in court of action respecting car service. The Court held that:

"Actor and reus differ in their respective attitudes

towards a litigation. The former has the burden of seeking the proper jurisdiction and bringing the proper parties before it, as well as the burden of proof upon the main issues; and these differences may be made the basis of distinctive treatment respecting the allowance of an attorney's fee as a part of the cost."

In the case of *Power Mfg. Co.* v. *Harvey Saunders*, 274 U. S. 490, 71 L. ed. 1165, this Court had under consideration a statute of the State of Arkansas permitting foreign corporations to be sued in any county in the State when it has established its right to do business in the State, whether it does business or is present or has a representative in the county or not, while suits against domestic corporations and individuals can be tried only in counties where they are found or do business or have a representative. The statute was attacked as being violative of the Fourteenth Amendment to the Constitution, and this contention was upheld. The Court, however, in disposing of this contention, in its opinion by Justice Van Devanter, referring to the Fourteenth Amendment, said:

> "It does not prevent a State from adjusting its legislation to differences in situation or forbid classification in that connection; but it does require that the classification be not arbitrary, but based upon a real and substantial difference, having a reasonable relation to the subject of the particular legislation. * * *"

The Court, continuing, said:

> "Here the separate classification of foreign corporations is in respect of the venue or place of bringing transitory actions. The statute means foreign corpo-

> rations doing business within the State by her permission, and therefore having a fixed place of business therein and a resident agent on whom process may be served. We speak only of them. So far as their situation has any pertinence to the venue of transitory actions, it is not distinguishable from that of domestic corporations and individuals."

In the case of *Quaker City Cab Co.* v. *Commonwealth of Pennsylvania,* 72 L. ed. 607, cited by appellant, there was involved a statute of the State of Pennsylvania, imposing a tax upon the gross receipts of corporations operating taxicabs, when it was not imposed upon individuals and partnerships engaged in the same business. The act was attacked on the ground that it violated the equal protection clause of the Fourteenth Amendment, and this Court held that such a statute was discriminatory as against such corporations. The Court, however, in its opinion, which was by Mr. Justice Butler, reaffirmed the time-honored principle of classification for legislative purposes, in the following language:

> "The equal protection clause does not detract from the right of the State justly to exert its taxing power or prevent it from adjusting its legislation to difference in situation or forbid classification in that connection; but it does require that the classification be not arbitrary but based upon a real and substantial difference, having a reasonable relation to the subject of the particular legislation." (Citing *Power Mfg. Co.* v. *Harvey Saunders,* 274 U. S. 490.)

Authorities Supporting the Constitutionality of the Act.

In support of the constitutionality of the act now under consideration, we desire first to call the attention of the Court to the language of the amendment under discussion, for the purpose of attempting to show that the classification is not made on the basis of ownership, but that it is made upon the basis of the manner of the operation of the cotton gin. The language of the proviso is as follows, to-wit:

> "Provided that on the presentation of a petition for the establishment of a gin *to be run co-operatively,* signed by one hundred citizens and taxpayers of the community where the gin is to be located, the Corporation Commission shall issue a license for said gin."

The classification imposed is not based upon ownership but upon the manner of operation. No one is denied anything. Any collection of one hundred citizens and taxpayers of the State of Oklahoma may secure a license for a gin to be run co-operatively, exactly in the same manner; the only limitation being that they must have one hundred petitioners who are citizens and taxpayers.

Constitutionality Presumed.

It is a fundamental and well recognized principle of constitutional law that legislative enactments are presumed to be constitutional and that the courts should not declare

an act to be unconstitutional unless it is clearly so; and if there is doubt, the express will of the Legislature should be sustained, and that where a statute is subject to two constructions, one conforming to and the other contravening the Constitution, the Courts will adopt that construction which conforms to the Constitution.

The following decisions of our Supreme Court have expressly held to this effect:

—*State* v. *Coyle*, 7 Okla. Cr. 50, 122 Pac. 243.

Ex parte Hunnicutt, 7 Okla. 213, 123 Pac. 179.

Stout v. *State ex rel Caldwell*, 36 Okla. 744, 130 Pac. 553.

Ex parte Ambler, 11 Okla. 449, 148 Pac. 1061.

Lahoma Oil Co. v. *State Industrial Commission*, 71 Okla. 160, 175 Pac. 836.

Dickinson v. *Perry*, 75 Okla. 25, 181 Pac. 504.

Ledegar v. *Bockoven*, 77 Okla. 58, 185 Pac. 1097.

Leach v. *State*, 188 Pac. 118, 17 Okla. Cr. 322.

In conformity to the uniform holding of Federal and State Courts generally, the Oklahoma Supreme Court, in the case of *Lovejoy* v. *State*, 194 Pac. 1087, has said:

> "The judiciary is not concerned with the wisdom of statutory enactments. We have no power to amend or repeal constitutional or statutory provisions, although we may disapprove of them. Arguments against such provisions must be addressed to the people or to the Legislature."

Classification for Legislative Purposes.

The general principle governing the classification of legislative subject matters as affected by the Fourteenth Amendment to the Constitution of the United States requiring equal protection of the law, is set forth in Corpus Juris, Vol. 12, page 1128, in the following language:

> "However, class legislation is not expressly named in the prohibitions of the State and Federal Constitutions; and neither the Fourteenth Amendment nor the provision of the State Constitutions prohibiting the granting of special privileges affect the validity of state statutes making reasonable classifications of persons or things for the various purposes of legislation. If there is a reasonable ground for the classification and the law operates equally on all within the same class, it is valid. And this is true even though the act confers different rights or imposes different burdens on the several classes. It is not necessary for the statute to show on its face the reason for the classifications adopted. In determining whether or not a basis of classification is reasonable, it must be looked at from the standpoint of the Legislature enacting it, the question of classification being primarily for the Legislature. A statute will be sustained where the basis for classification made by it could have seemed reasonable to the Legislature, even though such basis seems to the courts to be unreasonable. Legislative discretion in this matter is not subject to review by the courts, except to the extent of determining whether the classifications adopted is arbitrary, unreasonable and unjust. As in all the other cases involving the validity of statutes, all reasonable doubts are to be resolved in favor of upholding the validity of legislation establishing a classification, and the legislative judgment as to classification can be overthrown by the courts only when it is clearly erroneous. Classification must

be reasonable and not merely arbitrary. There is no general rule by which to distinguish reasonable and lawful from unreasonable and arbitrary classification. But in order that the act may be valid the classification must rest on real differences in the subject matter, having some relation to the classification made and the objects to be accomplished by the legislation, and must affect alike all persons or things within a particular class. A statute making no classification of the persons or property to which it applies is not void merely because there is room for a reasonable classification of such subjects."

The courts of practically every State in the Union have, at different times, had under consideration the question of reasonable classification for legislative purposes, and have supported the action by their legislators in that respect as being within the province of the legislative department of the States. *Willis et al.* v. *City of Ft. Smith*, 182 S. W. 275, involving the distinction between jitney busses and ordinary taxicabs and other motor vehicles and imposing different requirements.

People v. *Jordan*, 156 Pac. 451, holding that:

"Where from the facts before the court it was reasonable to assume there were sufficient causes for the Legislature to create a class, the courts will not disturb the act of the Legislature."

Commonwealth of Massachusetts v. *Walter M. Libbey*, 49 L. R. A. (N. S.) 879, holding that:

"If a legitimate purpose of a statute can be found, the Legislature must be presumed to have had that purpose in mind."

Ole Mathison v. *Minneapolis Street Railway Co.*, L. R. A. 1916D, page 412, saying:

> "When the Legislature has determined that a sufficient distinction exists between two classes of persons to justify applying rules to one class which do not apply to the other, such determination is binding upon the courts unless they can point out that the distinction is purely fanciful and arbitrary, and that no substantial or logical basis exists therefor."

Embree v. *Kansas City National Boulevard Road Dist.*, 166 S. W. 282, holding that:

> "A statute which embraces all persons and things that naturally belong to the same class and are similarly situated, and on whom it must operate uniformly and equally, is not invalid as class legislation."

State v. *Woodman*, 67 Pac. 1113, saying:

> "Very many laws do not operate alike upon all citizens of the State. They are, nevertheless, general in their application, because they include all citizens who are in a like situation."

City of Pond Creek et al. v. *Haskell*, 97 Pac. 338, holding:

> "A court will never declare an act of legislation, passed with all the forms and solemnities requisite to give it the force of law, unconstitutional and void, unless the nullity and invalidity of the act are paced, in its judgment, beyond a reasonable doubt."

State ex rel Lindsey v. *Derbyshire*, 140 Pac. 534, holding:

> "But while the courts frequently find and assign reasons for legislative classification, yet it is by no

means uniformly so. And it does not follow, because the reason for the classification is not disclosed in the face of the act, that it is necessarily without reason and capricious. Reasons eminently wise and provident might control the law-making body which do not appear upon the face of the statute, and for the courts to strike it down because not readily perceptible might well be criticized as an act of judicial usurpation. Nor is there any abdication of constitutional duty or responsibility in this action. The true question in each case is: Is the classification capricious, unreasonable or arbitrary? Citing *State ex rel* v. *Condon*, 108 Tenn. 82, 65 S. W. 871. Also *State ex rel Bell* v. *Frazier*, 36 Ore. 178, 59 Pac. 5; *McCarter* v. *McKelvey*, 78 N. J. Law 3, 74 Atl. 316, 130 Am. St. Rep. 583; *Lommen* v. *Minneapolis Gaslight Co.*, 65 Minn. 196, 68 N. W. 53, 33 L. R. A. 437, 60 Am. St. Rep. 450; *Lloyd* v. *Smith*, 176 Pa. 213, 35 Atl. 199; *Cook* v. *State*, 90 Tenn. 407, 16 S. W. 471, 13 L. R. A. 183; *Eckerson* v. *Des Moines*, 137 Iowa 452, 115 N. W. 177; *Pierce* v. *Kimball*, 9 Green. (Me.), 54, 23 Am. Dec. 537; *State ex rel Hunt* v. *Taussick*, 64 Wash. 69, 116 Pac. 651, 35 L. R. A. (N. S.) 802; 1 Lewis' Sutherland Statutory Construction (2nd Ed.) 217."

State v. *Fraternal Knights & Ladies*, 77 Pac. 500, saying:

"Equal protection of the laws given by the Constitution requires that the law shall have equality of operation, but that does not mean equality of operation on persons merely as such, but on persons according to their relations."

Also:

"It must be assumed that it was the object of the Legislature to establish such regulative conditions as will best serve and protect the rights of the citizens."

In the case of *Fidelity Mutual Life Association* v. *Mat-*

tler, 185 U. S. 308, 46 L. ed. 922, this Court, in discussing the classification of life insurance companies, which was the matter involved in the case, said:

> "The ground for placing life and health insurance companies in a different class from fire, marine and inland insurance companies is obvious, and we think that putting them in a different class from *mutual benefit and relief associations* doing business through lodges and benevolent associations of the character mentioned in the Texas statute is not an arbitrary classification, but rests on sufficient reason. The Legislature evidently intended to distinguish between life and health insurance companies engaged in business for profit (and we are not called on to refine as to the distribution of such profits) and lodges and associations of a mutual benefit or benevolent character, having in mind also the necessity of the prompt payment of the insurance money in very many cases, in order to provide the means of living of which the beneficiaries had been deprived by the death of the insured."

In the case of *Hayes* v. *State of Missouri,* 120 U. S. 82, 30 L. ed. 581, this Court, in discussing the matter of the reasonableness of classification of a statute of the State of Missouri providing that in all capital cases except in cities having a population of over 100,000 inhabitants the State should be allowed eight peremptory challenges to jurors, and in such cities shall be allowed fifteen, said:

> "The Fourteenth Amendment to the Constitution of the United States does not probihit legislation which is limited in objects to which it is directed, or by the territory within which it is to operate. *It merely requires that all persons subjected to such legislation shall be*

treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.''

The Court then, speaking through Mr. Justice Field, referred to a former decision of this Court which has become one of the leading decisions upon this question, to-wit, the case of *Barbier* v. *Connolly,* 113 U. S. 27, 28 L. ed. 923, where this Court in discussing class legislation, said:

> "Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

Also in the case of *Jessie Norton Torrence Magoun* v. *Ill. Trust & Savings Bank,* 170 U. S. 283, 42 L. ed. 1037, this Court, in discussing the right of a State to classify upon the basis of lineal and collateral relationship to the testator or intestate, made by a statute taxing inheritances, in upholding the statute as being constitutional and free from objection that it violated the Fourteenth Amendment, said:

> "Is the act open to this criticism? The clause of the Fourteenth Amendment specially evoked is that which prohibits a State denying to any citizen the equal protection of the laws. What satisfies this equality has not been and probably never can be precisely defined. Generally it has been said that it 'only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances.' Citing *Kentucky*

Railroad Tax Cases, 115 U. S. 321, 29 L. ed. 414."

The Court, continuing, then says:

> "It does not prohibit legislation which is limited, either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in privileges conferred and the liabilities imposed. Citing *Hayes* v. *Missouri,* 120 U. S. 68, *supra.*"

Continuing, the Court says:

> "But what is the test of likeness and unlikeness, circumstances and conditions? These expressions have almost the generality of the principle they are used to expound, and yet they are definite steps to precision and usefulness of definition, when connected with the facts of the cases in which they are employed. With these for illustrations, it may be safely said that the rule prescribes no rigid equality and permits to the discretion and wisdom of the State a wide latitude as far as interference by this Court is concerned. Nor with the impolicy of a law has it concern. Mr. Justice Field said in *Mobile County* v. *Kimball,* 102 U. S. 704, 26 L. ed. 242, that this Court is not a harbor in which can be found a refuge from ill-advised, unequal and oppressive State legislation. And he observed in another case: 'It is hardly necessary to say that hardship, impolicy, or injustice of state laws is not necessarily an objection to their constitutional validity.'
>
> "The rule therefore is not a substitute for municipal law; it only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relation. In some circumstances it may not tax A more than B, but if A be of a different trade or profession than B, it may. And in matters not of taxation, if A be a differ-

ent kind of corporation than B, it may subject A to a different rule of responsibility to servants than B; *Missouri P. Ry. Co.* v. *Mackey*, 127 U. S. 205 (32:107) to a different measure of damages than B (*Minneapolis & St. L. Ry. Co.* v. *Beckwith*, 129 U. S. 26 (32:585), and it permits special legislation in all of its varities. *Missouri P. Ry. Co.* v. *Mackey*, 127 U. S. 205; *Minneapolis & St. Louis R. Co.* v. *Herrick*, 127 U. S. 210 (32:109); *Duncan* v. *Missouri*, 152 U. S. 377 (38:485).

"In other words, the State may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion. It is not without limitation, of course. 'Clear and hostile discriminations against particular persons and classes especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition,' said Mr. Justice Bradley in *Bell's Cap R'd Co.* v. *Pennsylvania*, 134 U. S. 232-240 (33:892-896.)"

In the case of *Missouri Pacific Ry. Co.* v. *Mackey*, 127 U. S. 205, 32 L. ed. 107, this Court, in discussing the right of the State Legislature to classify in legislation, in discussing a statute of the State of Kentucky providing for liability for damages done to an employe of the railway company by reason of the negligence of its agents, mismanagement of its engineers or other employes, and in which the classification of employes as being arbitrary, is charged, the Court through Mr. Justice Field, said:

"The objection that the law of 1874 deprives the railroad companies of the equal protection of the laws is even less tenable than the one considered. It seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition; but nothing can be further from the fact.

> The greatest part of all legislation is special, either in the objects sought to be attained by it, or in the extent of its application. Laws for the improvement of municipalities, the opening and widening of particular streets, the introduction of water and gas, and other arrangements for the safety and convenience of their inhabitants, and laws for the irrigation and drainage of particular lands, for the construction of levees and the bridging of navigable rivers, are instances of this kind. Such legislation does not infringe upon the clause of the Fourteenth Amendment requiring equal protection of the laws, because it is special in its character; if in conflict at all with that clause, it must be on other grounds. And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions. A law giving to mechanics a lien on buildings constructed or repaired by them for the amount of their work, and a law requiring railroad corporations to erect and maintain fences along their roads, separating them from land of adjoining proprietors so as to keep cattle off their tracks, are instances of this kind. Such legislation is not obnoxious to the last clause of the Fourteenth Amendment, if all persons subject to it are treated alike under similar circumstances and conditions in respect to both of the privileges conferred and the liabilities imposed."

The Court at the close of its opinion said:

> "As said by the court below, it is simply a question of legislative discretion whether the same liabilities shall be applied to carriers by canal and stage coaches and to persons and corporations using steam in manufacturies."

Also in the case of *C. B. & Q. Railroad Co.* v. *Iowa*, 94 U. S. 155, 24 L. ed. 94, this Court, in the opinion by Mr. Justice Waite, in discussing and passing upon a statute of

the State of Iowa which divided the railroads of the State into classes according to business and established a maximum of rates for each of the classes and against which the charge was brought that it afforded an unequal protection of the laws and the Fourteenth Amendment to the Constitution, Mr. Justice Waite said:

> "The statute divides the railroads of the State into classes, according to business, and establishes a maximum of rates for each of the classes. It operates uniformly on each class, and this is all the Constitution requires. The Supreme Court of the State, in the case of *McAunich* v. *R. R. Co.*, 20 Iowa 343, in speaking of legislation as to classes, said: 'These laws are general and uniform not because they operate upon every person in the State, for they do not, but because every person who is brought within the relation and circumstances provided for is affected by the law. They are general and uniform in their operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of persons within the scope of their operation.' This act does not grant to any railroad company privileges or immunities which, upon the same terms, do not equally belong to every other railroad company. Whenever a company comes into any class, it has all the 'privileges and immunities' that have been granted by the statute to any other company in that class.
>
> "It is very clear that a uniform rate of charges for all railroad companies in the State might operate unjustly upon some. It was proper, therefore, to provide in some way for an adaptation of the rates to the circumstances of the different roads; and the General Assembly, in the exercise of its legislative discretion, has seen fit to do this by a system of classification. Whether this was the best that could have been done is not for us to decide. Our province is only to determine whether it could be done at all, and under

any circumstances. If it could, the Legislature must decide for itself, subject to no control from us, whether the common good requires that it should be done."

In the case of *Thos. Watson et al.* v. *Joseph Nevin*, 128 U. S. 578, 32 L. ed. 544, this Court had before it a statute enacted by the State of Kentucky, involving the question of local assessments for public improvements, and providing that a lien should attach for the amount so assessed against property. The law is attacked under the Fourteenth Amendment to the Constitution of the United States on the ground that it deprived plaintiff of property without due process of law and upon the ground that it denied the equal protection of the law. In deciding the case, Chief Justice Fuller discusses the reasonableness of the classification involved in the legislation, and citing the case of *Davidson* v. *New Orleans*, 96 U. S. 104, 24 L. ed. 619, said:

"It is not possible to hold that a party has without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case. And the conclusion was reached that neither the corporate agency by which the work is done, the excessive price which the statute allows therefor, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment is made before the work is done, nor that the assessment is unequal as regards the benefits conferred, nor that personal judgments are rendered for the amount assessed, are matters in which the State authorities are controlled by the Federal Constitution. So the determination of the taxing district and the manner of the apportionment are all within the legislative power.

Spencer v. *Merchant*, 125 U. S. 345, 31 L. ed. 763; *Stanley* v. *Albany Co.*, 121 U. S. 550, 30 L. ed. 1003; *Mobile Co.* v. *Kimball*, 102 U. S. 691, 26 L. ed. 238; *Hagar* v. *Reclamation District No. 108*, 111 U. S. 701, 28 L. ed. 569; *U. S.* v. *Memphis*, 97 U. S. 284, 24 L. ed. 937; *Laramie Co.* v. *Albany Co.*, 92 U. S. 307, 23 L. ed. 552; and whenever the law operates alike on all persons and property, similarly situated, equal protection cannot be said to be denied. *Wurtz* v. *Hoagland*, 114 U. S. 606, 29 L. ed. 229; *Richmond F. & P. R. Co.* v. *Richmond*, 96 U. S. 529, 24 L. ed. 737. The remedy for abuse is in the state courts; for, in the language of Mr. Justice Field in *Mobile* v. *Kimball*, 'This court is not the harbor in which the people of a city or county can find a refuge from ill-advised, unequal and oppressive state legislation.' "

In the recent case of *Joslin Mfg. Co.* v. *Providence*, 262 U. S. 668, this Court passed upon the question of whether or not a statute adopted by the Legislature of the State of Rhode Island, which provided for compensation in connection with eminent domain, and providing that certain mill owners should be allowed to recover the cost of removing his machinery to a new location within the northeastern States, and denying a similar right to one who desired to move to a location elsewhere, and in which the statute was questioned as being violative of the Fourteenth Amendment and equal protection clause, the Court said:

"Injury to a business carried on upon lands taken for public use, it is generall held, does not constitute an element of just compensation. (*Cox* v. *Philadelphia H. & P. R. Co.*, 213 Pa. 506, 114 Am. St. Rep. 970, 64 Atl. 729; 2 Lewis Em. Dom., 3rd Ed., 727), in the absence of a statute expressly allowing it (*Whiting* v. *Com.*, 196 Mass. 468, 82 N. E. 670; *Oakland* v. *Pacific*

Coast Lumber & Mill Co., 171 Cal. 392, 398, 153 Pac. 705). *This statute therefore does not deny a right; it grants one, and limits it to a business already established;* we cannot say that such a classification is unreasonable or arbitrary; and certainly it is not clearly so. * * *

"If the geographical limitation upon the liability to pay for the removal of machinery could be said to bring about a classification, the principles just discussed would control. The right is extended to all mill owners who choose to avail themselves of it, to recover the cost of removal within the defined territory."

In the case of *Crescent Cotton Oil Co.* v. *Mississippi*, 257 U. S. 129, 66 L. ed. 166, there was involved an act of the Legislature of the State of Mississippi, designated as the Anti-Gin Act, which prohibits corporations, whether organized under the laws of that State or authorized under the laws thereof to do any local business therein, from owning or operating any cotton gin, where such corporation is interested in the manufacture of cotton seed oil or cotton seed meal. The statute is attacked upon the ground that it is violative of the Fourteenth Amendment to the Constitution of the United States, and upon the ground that it does not afford equal protection of the law. The language of Mr. Justice Clarke in rendering the opinion holding against such contention, is as follows:

"Where, as we have found in this case, a foreign corporation has no Federal right to continue to do business in a State, and where, as here, no contract right is involved, and there is no employment by the Federal Government, it is the settled law that a State may impose conditions, in its discretion, upon the right

of such a corporation to do business, within the State, even to the extent of excluding it altogether. *Horn Silver Min. Co.* v. *New York,* 143 U. S. 305, 36 L. ed. 134, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403; *Baltic Min. Co.* v. *Massachusetts,* 231 U. S. 68, 83, 58 L. ed. 127, 133, 34 S. Ct. Rep. 15, and cases cited. And in such case the inherent difference between corporations and natural persons is sufficient to sustain a classification making restrictions, applicable to corporations only. *Hammond Packing Co.* v. *Arkansas,* 212 U. S. 322, 343, 344, 53 L. ed. 530, 541, 542, 22 Sup. Ct. Rep. 370; *Baltic Min. Co.* v. *Massachusetts, supra.* And see *Ft. Smith Lumber Co.* v. *Arkansas,* 251 U. S. 532, 64 L. ed. 396, 398, 40 Sup. Ct. Rep. 304; *American Sugar Ref. Co.* v. *Louisiana,* 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; *Williams* v. *Fears,* 179 U. S. 270, 276, 45 L. ed. 186, 189, 21 Sup. Ct. Rep. 128; *W. W. Cargill Co.* v. *Minnesota,* 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423.

"This would be sufficient to dispose of this second contention, but we may add that the law assailed was enacted by the State in the exercise of its police power, to prevent a practice conceived to be promotive of monopoly with its attendant evils. It is clearly settled that any classification adopted by a State in the exercise of this power which has a reasonable basis, and is therefor not arbitrary, will be sustained against an attack based upon equal protection of the laws clause of the Fourteenth Amendment, and also that every state of facts sufficient to sustain such classification which can be reasonably conceived of as having existed when the law was enacted will be assumed. *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C 160, and cases cited; *Rast* v. *Van Deman & L. Co.,* 240 U. S. 342, 60 L. ed. 679, L. R. A. 1917A 421, 38 Sup. Ct. Rep. 370, Ann. Cas. 1917B 455.

"The record before us above shows that before the law assailed was enacted, cotton gins had been oper-

ated in Mississippi by individuals, as well as by corporations, but there is no showing that oil mills and cotton gins were both operated by an individual or by groups of individuals, and we think it may be assumed under the rule stated, that because of the larger capital required, and perhaps for other reasons, oil mills and cotton gins may have been operated in that State only by corporations, and that for this reason the restraint of the evil aimed at by the act of the Legislature could be accomplished by controlling corporations only. Assuming this to be the fact when the law was enacted, obviously the classification objected to cannot be pronounced so without reasonable basis as to be arbitrary."

Also in the case of *Chicago, Rock Island & Pacific Ry. Co.* v. *D. J. Perry*, 259 U. S. 548, 66 L. ed. 1056, this Court had under consideration a statute of the State of Oklahoma known as the Service Letter Law, *requiring a public service corporation* to furnish through its superintendent or manager, to any employe discharged or voluntarily quitting its service, a letter setting forth the nature and duration of the service rendered by him, and state for what cause he was discharged, if discharged, or for what cause he quit the service. The Court in its opinion by Mr. Justice Pitney, in reply to the assertion that such a statute violated the Fourteenth Amendment to the Constitution of the United States and failed to afford equal protection of the laws, said:

"The contention that the Service Letter Law denies to plaintiff in error the equal protection of the laws is rested upon the fact that it is made to apply to public service corporations (and contractors working for

them) to the exclusion of other corporations, individuals and partnerships, said to employ labor under similar circumstances. This is described as arbitrary classification. We are not advised of the precise reasons why the Legislature chose to put the policy of this statute into effect as to public service corporations, without going further; nor is it worth while to inquire. It may have been that the public had a greater interest in the personnel of the public service corporations, or that the Legislature deemed it expedient to begin with them as an experiment—or any one of a number of other reasons. It was peculiarly a matter for the Legislature to decide, and not the least substantial ground is present for believing they acted arbitrarily. We feel safe in relying upon the general presumption that they knew what they were about. *Middleton* v. *Texas Power & Light Co.*, 249 U. S. 152, 157, 158, 63 L. ed. 527, 531, 39 Sup. Ct. Rep. 227, and cases cited."

In the case of *Middleton* v. *Texas Power & Light Co.*, 249 U. S. 152, *supra*, cited by Justice Pitney in the Service Letter Law case, which involved the law of the State of Texas with respect to employers' liability and compensation, and which was attacked upon the ground that it was violative of the Fourteenth Amendment to the Constitution guaranteeing equal protection of the laws to all citizens and prohibiting class legislation, for the reason that it exempted from its provisions person injured or killed as a result of personal injuries received by domestic servants, farm laborers and employes of any person, firm or corporation operating any railway as a common carrier, or laborers engaged in working for a cotton gin, or employes of any person, firm or corporation having in his or their em-

ploy not more than five employes, Mr. Justice Pitney, in disposing of this contention, said:

"However, we are clear that the classification cannot be held to be arbitrary and unreasonable. The Supreme Court of Texas in sustaining it said (108 Texas 110, 111, 185 S. W. 556, 11 N. C. C. A. 873): 'employes of railroads, those of employers having less than five employes, domestic servants, farm laborers and gin laborers, are excluded from the operation of the act, but this was doubtless for reasons that the Legislature deemed sufficient. The nature of these several employments, the existence of other laws governing liability for injuries to railroad employes, known experience as to hazards and extent of accidental injuries to farm hands, gin hands and domestic servants, were all matters no doubt considered by the Legislature in exempting them from the operation of the act. Distinctions in these and other respects between them and employes engaged in other industrial pursuits may, we think, be readily suggested. We are not justified in saying that the classification was purely arbitrary.'

"There is a strong presumption that a Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds. The equal protection clause does not require that state laws shall cover the entire field of proper legislation in a single enactment. If one entertained the view that the act might as well have been extended to other classes of employment, this would not amount to a constitutional objection. *Rosenthal* v. *New York*, 326 U. S. 260, 271, 57 L. ed. 212, 217, 33 Sup. Ct. Rep. 27, Ann. Cas. 1914B 71; *Patsone* v. *Pennsylvania*, 232 U. S. 138, 144, 58 L. ed. 539, 543, 34 Sup. Ct. Rep. 281; *Missouri, K. & T. R. Co.* v. *Cade*, 233 U. S. 642, 649, 650, 58 L. ed. 1135, 1138, 34 Sup. Ct. Rep. 678; *International Harvester Co.* v. *Missouri*, 234 U. S. 199, 215, 58 L. ed. 1276, 1283, 53

L. R. A. (N. S.) 525, 34 Sup. Ct. Rep. 859; *Kookee Consol. Coke Co.* v. *Taylor,* 234 U. S. 224, 227, 58 L. ed. 1288, 34 Sup. Ct. Rep. 856; *Miller* v. *Wilson,* 236 U. S. 373, 384, 59 L. ed. 628, 632, L. R. A. 1915F 829, 35 Sup. Ct. Rep. 342.

"The burden being upon him who attacks a law for unconstitutionality the courts need not be ingenious in searching for grounds of distinction to sustain a classification that may be subjected to criticism."

In the case of *Miller* v. *Wilson,* 236 U. S. 373, 59 L. ed. 628, cited by Justice Pitney in the Texas Power & Light case, *supra,* there was involved a statute of the State of California forbidding the employment of women in certain specified work for more than eight hours a day, including hotels, but which act did not include boarding houses, lodging houses, etc., and in which the act was attacked as violative of the Fourteenth Amendment to the Constitution and the equal protection clause thereof. The Court said, Mr. Justice Hughes delivering the opinion:

"The contention as to the various omissions which are noted in the objections here urged ignores the well-established principle that the Legislature is not bound, in order to support the constitutional validity of its regulation, to extend it to all cases which it might possibly reach. Dealing with practical exigencies, the Legislature may be guided by experience. *Patsone* v. *Pennsylvania,* 232 U. S. 138, 144, 58 L. ed. 543, 34 Sup. Ct. Rep. 361. It is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed the clearest. As has been said, it may 'proceed cautiously, step by step, and if an evil is specially experienced in a particular branch of business it is not necessary that the prohibition should be couched in all-embracing terms.' *Carrol* v.

Greenwich Ins. Co., 199 U. S. 401, 411, 50 L. ed. 246, 250, 26 Sup. Ct. Rep. 66. If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied. *Keokee Consol. Coke Co.* v. *Taylor*, 234 U. S. 224, 227, 58 L. ed. 1238, 1289, 34 Sup. Ct. Rep. 856. Upon this principle, which has had abundant illustration in the decisions cited below, it cannot be concluded that the failure to extend the act to other and distinct lines of business, having their own circumstances and conditions, or to domestic service, created an arbitrary discrimination as against the proprietors of hotels." Citing numerous decisions both of the Supreme Court of the United States and State Courts.

In the case of *Citizens' Teleph. Co.* v. *Fuller*, 229 U. S. 327, 57 L. ed. 1212, this Court discusses the act of the Michigan Legislature in classifying for taxation purposes, telephone companies, which act exempts the property of telephone companies whose gross receipts for the year do not exceed $500.00 from *ad valorem* taxes. This act was attacked in the Supreme Court as being violative of the Fourteenth Amendment to the Constitution, and as denying equal protection of the laws, for the reason that the telephone companies exempted all practically fell into what was known as rural or mutually operated companies organized by associations of farmers living along the lines. The Court, through Mr. Justice McKenna, in its opinion in discussing this contention, and overruling same, does so in the following language:

"It is manifest therefore that there are marked differences between the taxed and non-taxed companies,

and the differences might be pronounced arbitrary if the rule urged by appellant should be applied; that is, that in taxation of property no circumstances should be considered but its value; or, to use appellant's words, 'each dollar's worth should be treated alike.' But such rigid equality has not been enforced. In Michigan, the Legislature has the power of prescribing the subjects of taxation and exemption notwithstanding the Constitution of the State requires the Legislature to provide a uniform rule of taxation, except on property paying specific taxes. *People ex rel St. Mary's Falls Ship Canal Co.* v. *Auditor General,* 7 Mich. 84; *Chippewa County* v. *Auditor General,* 65 Mich. 408, 32 N. W. 651; *National Loan & Investment Co.* v. *Detroit,* 136 Mich. 451, 99 N. W. 380. The power of exemption would seem to imply the power of discrimination, and in taxation, as in other matters of legislation, classification is within the competency of the Legislature. We said in *American Sugar Refin. Co.* v. *Louisiana,* 172 U. S. 89, 92, 45 L. ed. 102, 103, 21 Sup. Ct. Rep. 43, that from time out of mind it has been the policy of this Government to classify for the purpose of taxation, and a discrimination was supported between taxation of producers and manufacturers of products, and yet in *Billings* v. *Illinois,* 188 U. S. 97, 102, 47 L. ed. 400, 403, 23 Sup. Ct. Rep. 272, we compared the rule with that in *Connally* v. *Union Sewer Pipe Co.,* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431, where a distinction between buyers of products and the producers of them was held an illegal discrimination.

"In *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237, 33 L. ed. 892, 10 Sup. Ct. Rep. 533, it was decided that under the power of classification there might be exemption of property, dependent upon its species, and the rates of excise might be varied upon different trades and products. And it was said that it was safe to say 'that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation.' It was pointed out that to

give it that effect would destroy the constitutional provision and laws of some of the States which, while enjoining uniformity of taxation, permitted exemptions which were deemed material, and that 'it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries; and the discouragement of intemperance and vice; and which every State, in one form or another, deems it expedient to adopt."

The case just referred to cites in support of the conclusion reached the case of *American Sugar Ref. Co.* v. *Louisiana,* 179 U. S. 89, 45 L. ed. 102, which involved a statute of the State of Louisiana which exempted from license tax sugar cane planters, who might desire in connection with the production of sugar cane to engage in the refining of their products into sugar, whereas those not classified as planters were requqired to pay the license tax and secure license. The American Sugar Refining Company attacked this statute as being unconstitutional under the Fourteenth Amendment to the Constitution and as denying equal protection of the laws. In disposing of this contention, which was denied, Justice Brown did so with the following observation:

"Congress, too, has repeatedly acted upon the principle of the Louisiana statute. Thus, after having imposed by the Act of August 2 of 1813 a license tax upon the retailers of wines and spirits for the purpose of providing for the expense of the war with Great Britain, it was further enacted by an Act of February 8th, 1815 (3 Stat. at L. 205, Chapter 40) that it should not be construed (to extend to vine dressers who sell at the

place where the same is made, wine of their own growth; nor shall any vine dresser for vending solely at the place where the same is made, wine of his own growth, be compelled to take out license as the retailer of wine). So, too, in the Internal Revenue Act of 1862 (12 Stat. at L. 432, Chapter 119), a license tax was imposed (64) upon retail dealers in all goods, wares and merchandise, but with a proviso in (66) that the act should not be construed 'to require a license for the sale of goods, wares and merchandise, made or produced and sold by the manufacturer or producer at the manufactory or place where same is made or produced; to vendors who sell at the place where the same is made wine of their own growth; nor to apothecaries, as to wines or spirituous liquors which they use exclusively in the preparation or making up of medicines for sick, lame or diseased persons.' Another paragraph of the same section (64) exempts distillers who sell the products of their own stills from a tax as wholesale dealers in liquors, while no questions of the power of Congress is involved these instances show that its general policy does not differ from that of the act in question, and that the discrimination is based upon reasonable grounds.

"So, too, this Court has repeated occasion to sustain discriminations founded upon reasons much more obscure than this. Thus, in *Richmond F. & P. R. Co .v. Richmond,* 96 U. S. 521, 24 L. ed. 724, a municipal ordinance was sustained declaring that no car or vehicle of any kind 'belonging to or used by the Richmond, Fredericksburg & Pontomac Railroad Company shall be drawn or propelled by steam' upon a certain street although no other company was named in the ordinance. The court held that as no other corporation had the right to run locomotives in that street, no other corporation should be in a like situation, and that the ordinance, while apparently limited in its operation, was general in its effect, as it applied to all who could do what was prohibited. 'All laws should be general in their operation, but all places within the same city

do not necessarily require the same local regulation. While locomotives may with very great propriety be excluded from one street or even from one part of a street, it would be sometimes unreasonable to exclude them from all.' In *Pembina Consol. Silver Min. & Mill Co.* v. *Pennsylvania,* 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737, it was decided that the equal protection clause did not prohibit a State from requiring, for the admission within its limits of a corporation of another State, such conditions as it chooses, though in that case it exacted a license tax from such corporations, which it did not exact from corporations of its own creation. In *Missouri P. R. Co.* v. *Mackey,* 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161, it was said that this clause did not forbid special legislation, 'and when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions.' To the same effect is *Ralston* v. *Vevn,* 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192.

"The power of taxation under this provision was fully considered in *Bells Gap Co.* v. *Penna.,* 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533, in which it was said not to have been intended to prevent a State from changing its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property altogether; may impose different specific taxes upon different trades or professions; may vary the rates of excise upon various products; may tax real and personal estate in a different manner; may tax visible property only, and not securities; may allow or not allow deductions for indebtedness.' All such regulations and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature or the people of the State in framing their Constitution. See, also, *Home Ins. Co.* v. *New York,*

134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; *St. Louis, I. M. & S. R. Co.* v. *Paul*, 173 U. S. 404, 43 L ed. 746, 19 Sup. Ct. Rep. 419.

"In *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250, a state statute defining an express company to be such as carry on the business of transportation on contracts for hire with railroad or steam boat companies, did not invidiously discriminate against the express companies defined by it, by exempting other companies carrying express matter and vehicles of their own. This case is specially pertinent to the one under consideration. See, also, *Giozza* v. *Tierman*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *Columbus Southern Railroad Co.* v. *Wright*, 151 U. S. 470, 38 L. ed. 238, 14 Sup. Ct. Rep. 396; *Duncan* v. *Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; *Western U. Teleg. Co.* v. *Indiana*, 165 U. S. 304, 41 L. ed. 725, 17 Sup. Ct. Rep. 345; *Adams Express Co.* v. *Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305.

"The Constitution of Louisiana classifies the refiners of sugar for the purpose of taxation into those who refine the products of their own plantations, and those who engage in a general refining business and refine sugar purchased by themselves or put in their hands by others for that purpose, imposing a tax only upon the latter class. To entitle a party to exemption it must appear, first, that he is a farmer or planter; second, that he grinds the cane as well as refines the sugar and molasses, meaning thereby the product of his own plantation. Whether he may also refine the sugar of others may be open to question; although by its express terms the act does not apply to planters who granulate syrup for other planters during the rolling season. The discrimination is obviously intended as an encouragement to agriculture and does not deny to persons and corporations engaged in a general refining business equal protection of the laws.

"The judgment of the Supreme Court of the State of Louisiana is affirmed."

The State of Wisconsin passed an act requiring every company transacting the business of life insurance within the State (excepting only fraternal societies having lodge organizations and insuring only the lives of their own members) to annually, on or before March 1, pay in lieu of all taxes for any purpose authorized by the laws of this State (except taxes on real estate) certain prescribed license fees for transacting such business. The Northwestern Mutual Life Insurance Company attacked the statute as being violative of the Fourteenth Amendment to the Constitution of the United States on account of discrimination as between companies not fraternal and having lodge organization, and only insuring the lives of their own members, and others engaged in the insurance business and subject to the act. This Court, in disposing of this contention (*N. W. Mutual Life Ins. Co.* v. *Wisconsin,* 247 U. S. 133, 62 L. ed. 1035) concluded the opinion by Mr. Justice Day in the following language:

> "As to the alleged discrimination between old line level premium companies and beneficial associations, which are exempted from taxation under their statute, we think the differences are plain. The fraternal and beneficial features are wanting in organizations like that of the Northwestern Company. The ascertainment and collection of premiums and payments for insurance are upon wholly different plans. As to the alleged discrimination in favor of stipulated premium companies and assessment companies, the plaintiff in

> error in its brief says that no domestic company of these classes and but one foreign company existed in Wisconsin in 1912, and that as to this its argument as to discrimination in favor of foreign level premium companies applies. What we have already said disposes of that contention. We find no reason to disagree with the Supreme Court of Wisconsin in the conclusion that differences upon which classification rests in this statute are not fanciful, but real and substantial, and that the dissimilarities in treatment fall short of that arbitrary classification which amounts to a denial of the equal protection of the laws."

Also in the case of *Sunday Lake Iron Co.* v. *Township of Wakefield,* 247 U. S. 350, 62 L. ed. 1154, this Court had under consideration a statute of the State of Michigan, in which it was charged that a discrimination had resulted in the enactment of a tax statute in that State which denied the equal protection of the laws to complainant, for the reason that its property was assessed at its full value while other taxable property in the same class is greatly undervalued by the taxing officers. Mr. Justice McReynolds, in delivering the opinion of the Court upon this question, said:

> "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property. *Raymond* v. *Chicago Union Traction Co.,* 207 U. S. 20, 35,

37, 52 L. ed. 78, 87, 88, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757. It is also clear that mere errors of judgment by officials will not support a claim of discrimination. There must be something more—something which in effect amounts to an intentional violation of the essential principle of practical uniformity. The good faith of such officers and the validity of their actions are presumed; when assailed, the burden of proof is upon the complaining party. Head Money cases (*Edye* v. *Robertson*), 112 U. S. 580, 595, 28 L. ed. 798, 802, 5 Sup. Ct. Rep. 247; *Pittsburgh C. C. & St. L. R. Co.* v. *Backus,* 154 U. S. 421, 435, 38 L. ed. 1021, 1039, 14 Sup. Ct. Rep. 1114; *Maish* v. *Arizona,* 164 U. S. 599, 611, 41 L. ed. 567, 571, 17 Sup. Ct. Rep. 193; *Adams Exp. Co.* v. *Ohio State Auditor,* 165 U. S. 194, 229, 41 L. ed. 683, 698, 17 Sup. Ct. Rep. 305; *New York* v. *Barker,* 179 U. S. 279, 284, 285, 45 L. ed. 190. 193, 196, 21 Sup. Ct. Rep. 121; *Coulter* v. *Louisville & N. R. Co.,* 196 U. S. 599, 608, 49 L. ed. 615, 617, 25 Sup. Ct. Rep. 342; *Chicago, B. & Q. R. Co.* v. *Babcock,* 204 U. S. 585, 597, 51 L. ed. 636, 640, 27 Sup. Ct. Rep. 326."

In the case of *Omaechevarria* v. *Idaho,* 246 U. S. 343. 62 L. ed. 769, this Court in construing a statute of the State of Idaho which prohibited the grazing of sheep on federal public domain upon a range previously occupied by cattle, which act was attacked upon the grounds that it violated the Fourteenth Amendment to the Constitution in that it denied the equal protection of the law and was discriminatory against the sheep owners, Mr. Justice Brandeis, speaking for the Court, said:

"We cannot say that the measure adopted by the State is unreasonable or arbitrary. It was found that conflicts between cattle rangers and sheep herders on

the public domain could be reconciled only by segregation. In national forests, where the use of land is regulated by the Federal Government, the plan of segregation is widely adopted. And it is not an arbitrary discrimination to give preference to cattle owners in prior occupancy without providing for a like preference to sheep owners in prior occupancy. For experience shows that sheep do not require protection against encroachment by cattle, and that cattle ranges are not likely to encroach upon ranges previously occupied by sheep herders. The propriety of treating sheep differently than cattle has been generally recognized."

Also in the case of *Travellers Insurance Co.* v. *Connecticut*, 185 U. S. 364, 46 L. ed. 949, this Court, in passing upon the classification of corporations for taxation purposes, against which was directed the allegation that it was violative of the Fourteenth Amendment to the Constitution and discriminated against certain properties owned by such corporations, Mr. Justice Brewer, in disposing of the case, said:

"But further, the validity of this legislation does not depend on the question whether the courts may see some other form of assessment and taxation which apparently would result in greater equality of burden. The courts are not authorized to substitute their views for those of the Legislature. We can only consider the legislation that has been had, and determine whether or no its necessary operation results in an unjust discrimination between the parties charged with its burdens. It is enough that the State has secured a reasonably fair distribution of burdens, and that no intentional discrimination has been made against non-residents."

In a very recent decision by this Court, in the case of

General American Tank Corp. v. *Day,* 70 L. ed. 239, a statute of the State of Louisiana is attacked by the tank company upon the ground that one of the revenue acts of that State discriminated against the tank car company in that it unreasonably classified its property for the purpose of taxation, thus imposing a hardship upon it, in violation of the Fourteenth Amendment to the Constitution of the United States. Mr. Justice Stone, speaking for the Supreme Court upon this question, says:

> "Where the taxing statute which is in lieu of a local tax assessed on residents discloses no purpose to discriminate against non-resident taxpayers, and in substance does not do so, it is not invalid merely because equality in its operation as compared with local taxation has not been attained with mathematical exactness. In determining whether there is a denial of equal protection of the laws by such taxation, we must look to the fairness and reasonableness of its purpose and practical operation, rather than to minute differences between its application in practice, and the application of the taxing statute or statutes to which it is complimentary."

In the case of *Billings* v. *Illinois,* 188 U. S. 97, this Court, in considering a statute enacted by the State of Illinois, in which it was alleged that as interpreted and enforced by the state courts the act discriminated as between lineal descendants of a decedent, and collateral heirs or strangers in blood. It was therefore attacked upon the ground that it violated the Fourteenth Amendment to the Constitution of the United States as affording unequal protection of the laws. Mr. Justice McKenna, in disposing

of this question, referring to the Magoun case, *supra*, among other things said:

> "We said it was established by cases that classification must be based on some reasonable ground. It could not be a 'mere arbitrary selection.' But what is the test of an arbitrary selection? It is difficult to exhibit it precisely in a general rule. Classification is essentially the same in law as it is in other departments of knowledge or practice. It is the grouping of things in speculation or practice because they 'agree with one another in certain particulars, and differ from other things in those same particulars.' Things may have very diverse qualities, and yet be united in a class. They may have very similar qualities, and yet be cast in different classes.
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> "If the purpose is within the legal powers of the Legislature, and the classification made has relation to that purpose (excludes no persons or objects that are affected by the purpose, includes all that are), logically speaking a law based upon it will have equality of operation. And, excluding our right to consider policies or assume legislation, we have many times said that a State in its purposes and in the execution of them must be allowed a wide range of discretion, and that this Court will not make itself a harbor in which can be found 'a refuge from ill-advised, unequal and oppressive' legislation. 102 U. S. 691, 26 L. ed. 238."

The case of *Grainger* v. *Douglas Park Jockey Club*, 148 Fed. 513, the Circuit Court of Appeals for the Sixth Circuit, in considering a statute passed by the State of Kentucky regulating horse racing, but exempting fair associations and trotting races from the provisions requiring license and license taxes, authorizing the conduct of

same, the Court, speaking through Judge Cochran, laid down certain rules with respect to the determination of the validity of statutes classifying for the purpose of license. Citing the case of *Ex parte Christensen,* 43 Fed. 243, the Court said:

"It is to be noted in this connection that the question whether said act confers arbitrary power is not to be determined by the fact that the power conferred may have been exercised arbitrarily as to the appellee. If such is the case, possibly it may have some bearing on the interpretation of the power conferred. In the Yick Wo case, Mr. Justice Matthews seems to intimate that the arbitrary action of the board of supervisors complained of therein did have an interpreting effect on the nature of the power conferred. But we think Judge Sawyer struck a true note in the case of *Ex parte Christensen* (C. C.), 43 Fed. 243, when he said:

" 'The validity of an ordinance must be determined by its terms, by what it authorizes, not by the manner of its execution. It is valid or invalid irrespective of the manner in which it is in fact administered. Its capability of being abused is the test. * * * Usually all persons engaged in the same business may be said to include all persons similarly situated, but not always; and in such cases that the classification embraces all persons engaged in the same business is not a correct test as to its validity.'

"The Court further says:

" 'The touchstone, therefore, of the validity of legislation depriving one of his liberty or property or making a discrimination amongst the persons to whom it is applicable is the public welfare. If the deprivation or classification has a real and substantial relation thereto it is valid, otherwise it is not. * * * If, then, in a given case the court must admit that it is possible for a reasonable man to conceive that the leg-

islation in question may subserve the public welfare, it must leave it alone.' Quoting Mr. Justice Holmes in the *Otis and Gasman case*, 187 U. S. 606, 47 L. ed. 323, where it was said:

"'While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view, as well as for possible peculiar conditions which this Court can know but imperfectly, if at all. Otherwise, a Constitution, instead of embodying all relatively fundamental rules of right as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semperubique et ab omnibus.*'

"And if further, in a given case, the court must admit that it is possible for the Legislature to have known some fact not known to it which would make the legislation in question conducive to the public welfare, it must keep its hands off. In the Powell case, it was agreed that the oleomargarine which the defendant was charged with having for sale, a portion of which he sold, was in packages so marked as to let purchasers know that it was oleomargarine and it appeared from the evidence offered and rejected that it was wholesome and nutritious, yet the statute and the conviction under it were upheld because it was conceived that it was possible that most kinds of oleomargarine in the market contained ingredients that were or might become injurious to health, a fact as to which the court could not take judicial knowledge, but might have been known to the Legislature and caused the passage of the law."

In the case of *Owen County Burley Tobacco Society* v. *Brumback*, 107 S. W. 710, the Court of Appeals of Ken-

tucky, in construing a statute of that State legalizing the pooling of tobacco and other farm products for the purpose of classifying, grading and selling the same in order that a higher price may be obtained therefor than could be received by selling the crops individually, and authorizing the parties forming the pool to select agents to hold the crops for the purpose of classifying and grading, the court in considering an attack upon the statute as being an arbitrary classification and violative of the Constitutional prohibition, said:

> "Nor does this right depend for its validity upon the police power of the State, as independent of this power the right to select and classify exists. *Hager, Auditor of Commonwealth* v. *Remington Typewriter Co.*, 105 S. W. 399, 32 Ky. Law Rep. 189. Looking at the act from this viewpoint, and as simply selecting a class of persons to deal with, it must be considered as within the power of the Legislature to enact it. The act does not attempt to regulate or control or prescribe any other occupation or business. What effect, if any, the privilege of combination conferred on farmers, to the end that greater price might be obtained for the product raised by them, would have on other classes of persons, if the act in terms excluding other persons from its operation and effect, or if other persons were complaining, is not before me. The act, although confining the privileges granted by it to farmers, does not in terms prohibit other persons or corporations from pooling their products, or from, pledging them to an agent to dispose of. *The act is classification, but not exclusion. It confers privileges upon a class, but does not withhold from others their enjoyment.* The validity or reach of the act, as applied to or affecting others than farmers, I express no opinion concerning. No person is objecting be-

cause he is denied privileges or immunities conferred upon this class of our citizens. It is assailed by one of the class for whose benefit it was enacted, and who upon the record before me must be treated as having voluntarily entered into the agreement authorized by it. If this act undertook to confer on farmers the exclusive privilege of combining and pooling their crops, to the end that a greater price might be obtained therefor, and expressly denied to other classes or persons the right to combine or pool their products for the same purpose, or if it should be so construed, it is plain that it would be a direct violation, not only of Section 3 of the Bill of Rights, but of the Fourteenth Amendment to the Constitution of the United States. The reading of Section 3 of the Bill of Rights, with its simple, yet strong language, so easily understood that no person of ordinary intelligence can mistake its meaning, leaves no room to doubt that 'no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men. Nor is it open to controversy that if the right was conferred upon certain specified persons or a class to combine or pool their crops or products in order that a better price might be obtained for them, and all other persons and classes were excluded from and denied this privilege, that it would be granting to the favored class 'exclusive separate privileges.' This point was expressly decided in *Simpson* v. *K. B. & L. Assn.*, 101 Ky. 496, 41 S. W. 570, and *Gordon* v. *Winchester B. & L. Assn.*, 12 Bush. 110, 23 Am. Rep. 713, and the correctness of the ruling is so manifest that it does not need further elaboration.

"Treating the act solely as a selection of a class of persons upon whom specified privileges are conferred, it is not in contravention of the Fourteenth Amendment to the Constitution of the United States, providing that 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall a State de-

prive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.' This section has been frequently considered by the Supreme Court of the United States, and it has been ruled that it does not deny the State the right to classify and select occupations, trades and professions. As stated in *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283, 18 Sup. Ct. 594, 42 L. ed. 1037: 'In other words, a State may distinguish, select and classify objects of legislation and necessarily this power must have a wide range of discretion. It is not without limitation, of course.' And in *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232, 10 Sup. Ct. 533, 38 L. ed. 892, the Court said: 'Clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our Governments, might be obnoxious to the constitutional prohibition.' To the same effect (*Gulf, Colorado & Santa Fe. R. Co.* v. *Ellis,* 165 U. S. 150, 17 Sup. Ct. 255, 41 L. ed. 666). Nor does this amendment prohibit the State from granting rights or conferring privileges on persons or classes, but only declares that when rights or privileges are conferred, all persons and classes that may be fairly included within the scope of the law granting the privileges or immunities shall have the benefit of them, whether so intended or not. *Hayes* v. *State of Missouri,* 120 U. S. 68, 7 Sup. Ct. 350, 31 L. ed. 578; *Barbier* v. *Connolly,* 113 U. S. 27, 5 Sup. Ct. 357, 28 L. ed. 923; *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 546, 22 Sup. Ct. 431, 46 L. ed. 679; *Commonwealth* v. *Johnson,* 78 Ky. 509. This act does not in terms discriminate against any other person or class of persons; and if it could be held to be discriminatory it is clear that that question cannot be raised by the defendant. He has not been discriminated against. He has not been denied any privilege or immunity that is granted to any other person or class of persons, nor has he been denied the equal protection of the law.

"It is next insisted that it is violative of Section 198 of the Constitution, before quoted. In considering this aspect of the case, I shall assume that the purpose of the act is as stated in it—to permit the pooling and combining of crops for the purpose of classifying, grading and disposing of the same in order that a greater or higher price may be obtained therefor than could be received by selling the crops separately. It is manifest that the real, and in fact, only, object of the act was to enable the producers by pooling and combination to obtain better prices than they could get if they sold their crops separately and as distinct individuals. The right to select, grade, store and hold is merely a means to the accomplishment of the chief end, which is to get a greater price. It would be idle to say that the legislators intended only that the producers might combine for the purpose of grading, classifying and storing their crops, and this was the sole purpose of the act; and it was not contemplated or intended that by this process of grading, classification and storing they should regulate or control the market, and thereby obtain a higher price for the crops than they could command as individuals. It would be equally absurd to say to the farmer that this act only allowed him to grade and classify, but not to fix, regulate and control the price of the product, when he knows that the end to be accomplished was to control, regulate and fix the price by placing all the crops in the hands of a general agent, with power to hold them until a reasonable and adequate price could be obtained. This is the only construction the act is susceptible of, in my judgment."

In the case of *Commonwealth* v. *Hodges,* 125 S. W. 692, construing the same statute which had been construed in the Owen County Burley Tobacco Company case as amended in 1908, and which was under attack because of discriminatory and arbritary classification, the Court of

Appeals of Kentucky, in its opinion, in referring to the Owen County case, said:

> "The question for the court is, what did the Legislature really direct? And this intention must be sought in the whole of the act taken together, and other acts in *pari materia*. It is not the custom of Legislatures to declare their purposes as such. Legislation is usually enacted from time to time bearing on particular subjects. The courts presume that the Legislature intended all its enactments on a given subject to constitute a consistent treatment within constitutional limitations of the whole subject. Provisions of the Constitutions are therefore to be read in conjunction with such statutes, and all of them—the provisions of the Constitutions, State and Federal, and the several enactments of the Legislature—will be treated as a harmonious, consistent system, in preference to supposing that, literally construed, one is repugnant to the others, and some enactments in consequence wholly fail. As, then, the Legislature had left the Act of 1890 upon the statute books, and had enacted the one of 1906, upon the same subject, meaning by it to confer the right upon some to pool their property for the purpose and to the extent not forbidden by Section 198 of the Constitution, we must construe these two statutes and the section of the Constitution together. And, in doing so, we must take into view the Fourteenth Amendment to the Constitution of the United States, as it also was presumably in the legislative mind in enacting the last statute. If it be construed that the Legislature intended a discrimination between farmers and all others, their enactment would be void. We must reject that view of it, if any other can be made to apply. If, however, it be construed that the Act of 1906 operates to confer upon all persons the same benefits, as was intimated in the opinion in *Owen County Burley Tobacco Co.* v. *Brumback, supra,* then there is no discrimination. As that construction is possible under the language employed, and as it would

sustain the validity of the act, it must be adopted. *It, therefore, follows that appellee and all others have the right, under the existing laws in Kentucky, to pool their property, or combine their capital and other resources so as to get no more than the real value of their property when sold in the market.*"

In the case of *German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389, 58 L. ed. 1011, this Court, passing upon a Kansas statute of 1909 regulating insurance and exempting farmers' mutual insurance companies organized and doing business under the laws of the State, and insuring only farm property, from the legislative scheme for regulation, the Court, in an opinion by Mr. Justice McKenna, upholding the classification and the exception, says:

"The bill attacks the statute of Kansas as discriminating against complainant because the statute excludes from its provisions farmers' mutual insurance companies, organized and doing business under the laws of the State, and insuring only farm property. The charge is not discussed in the elaborate brief of counsel, nor does it seem to have been presented in the lower court; it is, however, covered by the assignments of error.

"The provision of the statute is: 'That nothing in this act shall effect farmers' mutual insurance companies, organized and doing business under the laws of this State, and insuring only farm property.' The distinction is therefore between co-operative insurance companies insuring a special kind of property and all other insurance companies. It is only with that distinction that we are now concerned. There are special provisions in the statute of Kansas for the organization of co-operative companies, and if the statute under review discriminates between them, the German Alliance Company cannot avail itself of the discrim-

ination. A citation of cases is not necessary, nor for the general principle that a discrimination is valid if not arbitrary, and arbitrary in the legislative sense, that is, outside of that wide discretion which a Legislature may exercise. A legislative classification may rest on narrow distinctions. Legislation is addressed to evils as they may appear, and even degrees of evil may determine its exercise. *Ozan Lumber Co.* v. *Union County Nat. Bank,* 202 U. S. 623, 50 L. ed. 1176, 26 Sup. Ct. Rep. 768. There are certainly differences between stock companies, such as complainant is, and the mutual companies described in the bill, and a recognition of the differences we cannot say is outside of the constitutional power of the Legislature. *Orient Ins. Co.* v. *Daggs,* 172 U. S. 557, 32 L. ed. 552, 19 Sup. Ct. Rep. 281."

In the case of *Dark Tobacco Growers Co-op. Assn. et al* v. *Dunn,* 266 S. W. Rep. 308, the Supreme Court of Kentucky passed upon a statute of the State of Kentucky, known as the Bingham Co-operative Marketing Act of 1922, which was attacked upon the ground that it violated the Fourteenth Amendment to the Federal Constitution in that it did not afford equal protection. This statute authorized:

"Any association organized hereunder shall be deemed not to be a conspiracy nor a combination in restraint of trade; nor an illegal monopoly, nor any attempt to lessen competition or to fix prices arbitrarily or to create a combination or pool in violation of any law of this State; and the marketing contracts and agreements between the association and its members and any agreements authorized by this act shall be considered not to be illegal nor in restraint of trade nor contrary to the provisions of any statute enacted against pooling or combinations."

The purpose of the act had been set forth in Section 1 as follows:

> "In order to promote, foster and encourage the intelligent and orderly marketing of agricultural products through co-operation, and to eliminate speculation and waste; and to make the distribution of agricultural products between producer and consumer as direct as can be efficiently done; and to stabilize the marketing of agricultural products, this act is passed."

The Court, in answering the objections urged, and particularly answering counsel's argument based upon the citation of *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. ed. 679, in which the Supreme Court of the United States held that the Illinois Anti-Trust statute violated the provisions of the Fourteenth Amendment because it excepted from the provision of the act agricultural products or livestock while in the hands of the producer or raiser, the Court said:

> "In that case the court was dealing with a statute which made trusts or combinations in restraint of trade a crime, but which excepted from its provisions 'producers of agriculture and raisers of live stock.' Certainly no reasonable justification could be offered in support of a classification of that nature. If it is wrong for a merchant to monopolize a particular business, it is likewise wrong for a farmer to do so. The principle is the same in both cases. If the act here involved has for its object the destruction of competition and the creation of a monopoly, then it violates the equal protection clause of the Constitution, and is invalid."

The Court also said in discussing this principle:

> "Statistics show that the price paid by the con-

sumer for farm products is sufficiently high, but that the producer receives only 35 per cent of this sum, the middleman (so to speak) receiving 65 per cent. One of the main objects of the association is to bring about a more just apportionment of the price paid by the consumer. The righteousness of this claim on the part of the producer is generally conceded.

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"We are impressed with the idea that co-operative marketing of farm products is an economic necessity. It was championed by all three parties in the recent national political contest. It has been enacted into law by the Congress of the United States (The Capper-Volstead Act, U. S. Comp. St., Ann. Supp. 1923, 8716½, 8716½a), and by the Legislatures in two-thirds of the States. The Legislature of Tennessee passed such an act in 1923 (Chapter 100). The policy of the State as expressed by the Legislature, is found in Section 5 of said act, as follows:

" 'That every group of persons contemplating the organization of an association under the act is urged to communicate with the College of Agriculture, University of Tennessee, who will inform them whatever survey of the marketing conditions affecting the commodities proposed to be handled may indicate regarding probable success.

" 'It is here recognized that agricultural is characterized by individual production in contrast to the group or factory system that characterizes other forms of industrial production; and that the ordinary form of corporate organizations permits industrial groups to combine for the purpose of group production and the ensuing group marketing and that the public has an interest in permitting farmers to bring their industry to the high degree of efficiency and merchandising skill evidenced in the manufacturing industry; and that the public interest urgently needs to prevent the migration from the farm to the city in order to

keep up farm production and to preserve the agricultural supply of the Nation; and that the public interest demands that the farmer be encouraged to attain a superior and more direct system of marketing in the substitution of merchandising for the blind, unscientific and speculative selling of crops; and that for this purpose the farmer should secure special guidance and instructive data from the College of Agriculture of the University of Tennessee.'

"The validity of these acts has been sustained by every court passing upon them. *Burley Tobacco Growers Co-op. Assn.* v. *Gardner, decided* February 24, 1924, but not yet published; *Northern Wisconsin Pool* v. *Bekkedal* (Wis., 1924), 197 N. W. 936; *Dark Tobacco Growers Assn.* v. *Potter* (1925), 201 Ky. 441, 257 S. W. 35; *Tobacco Growers Co-op. Assn.* v. *Jones* (1923), 185 N. C. 265, 117 S. E. 174; *Brown* v. *Staple Cotton Assn.* (1923), 132 Miss. 859, 96 So. 849; *Texas Farm Bureau Assn.* v. *Stovall,* Tex. Sup. Ct. (1923), 253 S. W. 1101; *Kansas Wheat Growers Co-op. Assn.* v. *Schulte* (1923), 113 Kan. 72, 216 Pac. 311; *Oregon Growers* v. *Lentz* (1923), 107 Ore. 561, 212 Pac. 811; *Washington Cranberry Growers Assn.* v. *Moore* (1922) 117 Wash. 430, 201 Pac. 773, 204 Pac. 811; *Citrus Fruit Assn.* v. *Yeoman* (1921), 51 Cal. App. 759, 197 Pac. 959; *Ex parte Baldwin County Producers Corp.* (1919) 203 Ala. 345, 83 So. 69; *Casterland Milk Co.* v. *Shentz* (1919), 179 N. Y. 131."

The Court then quotes from the *Burley Tobacco Growers Assn.* v. *Gardner, supra,* calling particular attention to the fact that these cases are clearly distinguishable from the case of *Connolly* v. *Union Sewer Pipe Co.* After discussing other cases cited upon this question, the Court then concludes:

"In our opinion, *Connolly* v. *Union Sewer Pipe Co.* is not in point nor in conflict with the conclusions which

we have reached. On the other hand, our decision finds support in later utterances of the Supreme Court of the United States in the cases enumerated in the Mason case, in which the Court holds that in suits to dissolve the cause violative of the anti-trust statute it is not a question of whether the corporation has power to do so, but what it has done and is doing for that act is directed against monopoly and not against an expectation of it."

In the case of *Stebbins* v. *Riley,* 268 U. S. 137, 69 L. ed. .885, a recent decision of this Court, in an opinion by Mr. Justice Stone, the same question as was involved in the earlier case of *Magoun* v. *Illinois Trust & Savings Bank, supra,* is considered. The decision passes upon the classification contained in a provision of the Inheritance Tax Act of the State of California. In disposing of the contention that the classification violated the guaranty of the Fourteenth Amendment in the equal protection of the laws, the Court said:

"The guaranty of the Fourteenth Amendment of the equal protection of the laws is not a guaranty of equality of operation or application of state legislation upon all citizens of a State. As was said in *Magoun* v. *Illinois Trust & Savings Bank, supra,* at page 293 (42 L. ed. 1042, 18 Sup. Ct. Rep. 594):

" 'It only prescribes that that law have the attribute of equality of operation and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations. In some circumstances it may not tax A more than B, but if A be of a different trade or profession than B, it may. * * * In other words, the State may distinguish, select and classify objects of legislation

and necessarily this power must have a wide range of discretion.'

"The taxing statute may, therefore, make a classification for purposes of fixing the amount or incidence of the tax, provided only that all persons subjected to such legislation within the classification are treated with equality, and provided further that the classification itself be rested upon some ground of difference having a fair and substantial relation to the object of the legislation. *Magoun* v. *Illinois Trust & Savings Bank, supra; F. S. Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 64 L. ed. 969, 40 Sup. Ct. Rep. 560.

"It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature or the people of the State in framing their Constitution. *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 553."

The opinion of the lower court, written by Honorable R. L. Williams, Judge of the United States Court for the Eastern District of the State of Oklahoma, and concurred in by the other two Judges, cited with approval the cases hereinbefore cited of *C. B. & Q. R. R. Co.* v. *Iowa,* 94 U. S. 155; *Crescent Cotton Oil Co.* v. *Mississippi,* 257 U. S. 129; *Middleton* v. *Texas Power & Light Co.,* 249 U. S. 152; *Chi-*

cago, Rock Island & Pacific Ry. Co. v. *D. J. Perry,* 259 U. S. 548; *Omaechevarri* v. *Idaho,* 246 U. S. 343; *Fidelity Mutual Life Assn.* v. *Mettler,* 185 U. S. 308; *Citizens Telephone Co.* v. *Fuller,* 229 U. S. 322; *German Alliance Ins. Co.* v. *Lou's,* 233 U. S. 389; *Dark Tobacco Growers Co-op. Assn.* v. *Dunn,* 266 S. W. 308; *Choctaw Cotton Oil Co.* v. *Corporation Commission,* 247 Pac. 390; *Planters Cotton & Ginning Co.* v. *West,* 82 Okla. 145, 247 Pac. 390; and based the opinion of the Court on these decisions as well as other decisions cited by this Court in those cases. The Court then says:

> "The gin is to be operated co-operatively and is thereby placed in a classification by the Legislature of the State. We do not reach a conclusion that such a classification is so unreasonable that it should be judicially annulled. If it is organized under the statute making that classification, and is so operated, the fact that others besides growers and producers are permitted to become incorporators, does not operate to render the classification violative of the Fourteenth Amendment. They are limited as to amount of stock and voting participation and as to profits. The idea of the law and the trend of contemporary thought of law-givers and expressions of courts alike is to encourage co-operative dealing in the products of agriculture. The complainant rests his case under the contention of a violation of the Federal constitutional provision guaranteeing equal protection of the law, which seems to be without substantial merit."

The case of *Liberty Warehouse Co.* v. *Burley Tobacco Growers Co-op. M. Assn.,* 72 L. ed. — (not yet officially reported), affirms the same case which is cited in the brief

of appellees, in the first appeal to this Court, and in our opinion rules the case now before the Court for consideration. In that case a statute of the State of Kentucky, known as the Bingham Act, authorizing the incorporation of non-profit co-operative associations for the orderly marketing of agricultural products, was under consideration. The statute provided that *only producers may become members and that the corporation may contract only with them for marketing such products.* It declares that these contracts shall not be illegal, prescribes penalties for interfering therewith, and further provides that the association shall not be deemed a conspiracy, illegal combination or monopoly. The Liberty Warehouse Company, a Kentucky corporation, violated the terms and provisions of this statute by selling pledged tobacco, whereupon suit was brought by the Burley Tobacco Growers Co-op. M. Association, incorporated under the Bingham Act, for the prescribed penalty provided by the act, of $500.00 and attorney's fees. Judgment was recovered therefor. The case came to this Court on writ of error, where the statute was attacked for several reasons; one of which was that Sections 26 and 27 of the Act violates the Fourteenth Amendment to the Constitution in that said sections and each of them breaches defendant's privileges and immunity as a citizen of the United States and deprives defendant of its corporate life, liberty and property without due process of law, and denies to it the equal protection of the laws. This Court,

in an opinion by Mr. Justice McReynolds, after stating that this contention suggests the only federal question open for consideration, said:

> "Certainly the statute impaired no right of the warehouse company guaranteed by the Fourteenth Amendment by merely authorizing corporations with membership limited to agriculturists and permitting contracts for purchase and re-sale of farm products. This also is true of the declaration that such associations shall not be deemed monopolies, combinations or conspiracies in restraint of trade, and that contracts with members shall not be illegal. The State may declare its own policy as to such matters. * * *
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> "Do the provisions of the Bingham Act which afford peculiar protection to marketing contracts with members of the association, deprive the warehouse company of equal protection of the laws, or conflict with the due process clause of the Fourteenth Amendment, because without reasonable basis and purely arbitrary? These questions may be fairly said to arise upon the present record.
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> "The statute penalizes all who wittingly solicit, persuade or induce an association member to break his marketing contract. *It does not prescribe more rigorous penalties for warehousemen than for other offenders. Nobody is permitted to do what is denied to warehousemen. There is no substantial basis upon which to invoke the equal protection clause.*"

We pause here to call the attention of the Court to the similarity of the circumstances of this case to the one now before the Court. Nobody is denied by the statute of Oklahoma the right to secure a license for the operation of a co-operative gin in the manner prescribed. No more rigorous penalties fall upon the commercial ginners of the

State than fall upon others similarly situated, for the reason that any one hundred citizens of the State, regardless of occupation, may secure a license upon equal terms and without discrimination.

The Court then distinguishes the Liberty Warehouse case from the case of *Connally* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. ed. 679, *supra,* which was much relied upon in that case and which is also much relied upon in this case. The Court says:

> "But there the circumstances differed radically from those here presented; and always to determine whether equal protection is denied, there must be consideration of the peculiar facts. Connolly resisted judgment for the purchase price of pipe upon the ground that the Union Company, the vendor, belonged to a combination or trust forbidden by an Illinois statute. The statute defined a trust, made participation therein criminal, and directed that those who purchased articles from an offending member should not be held liable for the price. Section 9 declared: 'The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser.' This Court held that because of the exemption, the Union Company was denied the equal protection of the law. It was forbidden to do what others could do with impunity. Here the situation is very different. The questioned statute undertakes to protect sanctioned contracts against any interference * * * no one could lawfully do what the warehouse company did."

So here: everyone may do what the Co-operative Gin Company of Durant did, under the same circumstances and conditions. That is, any one hundred citizens and taxpay-

ers within the State of Oklahoma may, by the identical steps which are reasonable, secure a co-operative license upon presentation of a petition signed by one hundred citizens, to the Corporation Commission, upon equal terms as did the Co-operative Company of Durant.

Distinction Between the Two Classes of Ginners Upon Which the Act Is Based.

The ordinary commercial ginner within the State of Oklahoma may gin either as an individual, a co-partnership or a corporation. There is no statute, rule or regulation which limits him in any wise in the enjoyment of the full proceeds of his earning under the rate fixed. He usually is engaged not only in ginning cotton as a public service, but also in the purchase of cotton seed and in the purchase of cotton for profit (which is an independent, private business not subject to control). At least 50 per cent of the gins so operated are owned and controlled by the cotton seed crushers operating cotton seed oil mills within the State of Oklahoma, which concerns operate the gins not entirely for the purpose of rendering a public service, but for the purpose of collecting cotton and cotton seed at a central point, to-wit: they gin to the end that they may be enabled to purchase it under favorable conditions. The cotton seed extracted from a farmer's cotton at such gins is ordinarily mixed with the general mass of seed extracted from other cotton and sold by the owner to the gin opera-

tor, which, in the instance, is the cotton seed crusher. Such ginning concerns under favorable conditions, have been known to profit in one season to as high degree as 150 per cent. As a matter of fact, it is alleged in the answer filed to the bill in the lower court, that appellant made an average profit on the cotton ginned at the gins in which he was interested in Durant, of 85 per cent for the year preceding the filing of this cause of action.

There is no statutory restriction upon corporations or individuals or others engaged in this character of ginning. Upon the other hand, we call attention to the restrictions which are thrown around co-operative concerns, and the conditions upon which they are required by statute to operate businesses conducted by them within the State of Oklahoma.

The Legislature of the State of Oklahoma has enacted two separate and distinct statutes authorizing the organizations of co-operative concerns. The first of these acts is in Article 16 of Chapter 34, Compiled Oklahoma Statutes 1921, and the purpose for which such an organization may be formed is set forth in Section 5599, Compiled Oklahoma Statutes 1921, as amended by Chapter 181, Session Laws 1923, and reads as follows:

> "Any number of persons, not less than five, engaged in the production of agricultural or horticultural products may act together and organize co-operative associations, not having capital stock and not conducted for profit, for mutual help in collectively processing,

preparing for market, picking, storing, shipping, handling and marketing such products of persons so engaged; and the manufacturing or the making of the by-products thereof; or in the financing of any of the above activities; and may have marketing agencies in common with other like or similar associations; and such associations and their members may make all necessary contracts and agreements to effect such purposes; and such association may make advances to members, and such members may hire, rent, or buy their farm supplies and machinery from or through the association; provided, that such association shall be operated for the *mutual benefit of the members thereof,* only as such producers; and no member of the association shall have more than one vote because of the membership capital he may own therein, and such associations shall not pay dividends on membership capital in excess of 8 percentum per annum. And cooperative associations not having capital stock now existing in Oklahoma, exercising, or attempting to exercise, corporate rights and powers, or to perform duties as a corporation, for the purpose or any of the purposes aforesaid, are hereby validated, and are granted all of the rights and powers, and subjected to all of the restrictions and limitations of this Act, as herein amended; and are granted for the enforcement of existing as well as subsequent contracts, all of the rights and remedies herein provided."

It will be observed that concerns organized under this statute with no capital stock, are not conducted for profit, and are organized for mutual help in collectively processing, preparing for market, picking, storing, shipping, handling and marketing such products of persons engaged in the production of agricultural or horticultural products and the manufacturing or the making of the by-products thereof.

As stated in the outset, the act under consideration does not define what is meant by the term "to be operated co-operatively." Therefore if it is possible by any manner of legal means for a concern so operating a gin, to be differently classified from the ordinary commercial ginner, then the act must stand regardless of the fact that there might possibly be concerns attempting to operate gins in a manner which might be construed not to be co-operative. The remedy in that instance would not be against the Corporation Commission of the State of Oklahoma, or any state official or board, but then would be against the person so operating. Under this statute there certainly is an extreme distinction between concerns organized under it for the purpose of ginning cotton, not for profit, but for mutual self-help of those engaged in agricultural and horticultural business, and the ordinary commercial gin or ginner, as there could possibly be under any given circumstance.

Here are two entirely separate and distinct classes of concerns, not based upon the ownership, as stated by counsel, but upon the conditions affecting each and upon the manner of conducting the business, which have been held in all the cases to be a constitutional basis of classification.

As a matter of fact, such organizations as those permitted by the 1917 statute, quoted above, for the purpose

of self-help upon a non-profit basis, purely for the purpose of rendering service to the members of such organizations, in our opinion would not be subject to any character of regulation whatsoever, any more than a private individual would be subject to regulation in the construction and operation of a cotton gin plant solely for the purpose of ginning his own cotton. *Wolff Packing Co.* v. *Court of Industrial Relations of the State of Kansas,* 262 U. S. 521, 67 L. ed. 1103, and cases cited.

However, in the instant case, the Durant Co-operative Gin Company was organized under the second of these acts, to-wit, the Act of 1919, found in Article 19, Chapter 34, Compiled Oklahoma Statutes 1921; the purpose of such concerns being stated in Section 5637 thereof as follows, to-wit:

> "Ten or more persons may form a corporation for the purpose of conducting an agricultural, dairy, live stock, irrigation, horticultural, mercantile, mining, manufacturing, mechanical or industrial business upon a co-operative plan, and with their associates, successors and assigns, may become and be a body politic and corporate by complying with the provisions of this act."

This statute *provides that any ten persons* within the State of Oklahoma, regardless of their occupation and regardless of the circumstances or conditions, may incorporate themselves into a co-operative corporation for the purpose of engaging in the business authorized, which clearly includes the business of ginning cotton within the State of

Oklahoma. The Choctaw Cotton Oil Company or the Chickasha Cotton Oil Company, or any other ginning interests within the State of Oklahoma could organize under the provisions of this statute, and upon application to the Corporation Commission, supported by a petition of one hundred citizens and taxpayers, could secure a license without further showing, just as farmers and business men may organize and present a petition supported by one hundred citizens and taxpayers and secure a license to gin cotton. There is absolutely no discrimination whatsoever as between persons belonging to the classes contemplated by the Legislature in distinguishing between co-operative ginners and ordinary ginners. In other words, the rule applies and is particularly applicable for the reason that it deals with all engaged in the same business under circumstances and conditions exactly the same.

We have taken the time and gone to the trouble of investigating the distinction which may exist between an ordinary person, individual or corporation engaged in the ginning of cotton for profit, and the co-operative association who receives license and which is organized under the 1919 statute. The distinctions are found in Sections 5641 to 5642, inclusive, Compiled Oklahoma Statutes 1921, and are as follows:

First: The co-operative association is specially authorized by an act of the Legislature.

Second: The organization is distinct with respect to the number of incorporators and as to the purpose for which it may be incorporated; the ordinary corporation being allowed to incorporate with not less than three members, while the co-operative association must have not less than ten members.

Third: The statute provides different powers from those possessed by the ordinary corporate concern.

Fourth: The statute in Section 5642 provides that no stock shall be sold for less than par, while the stock of an ordinary corporation or the interest in an ordinary ginning concern may be sold for any consideration which may be agreed upon.

Fifth: The statute provides in Section 5642 that not less than 20 per cent of the value of the stock must be paid before business is commenced, while an ordinary individual, person or corporation can commence business whether any of the capital stock had been paid in or not, providing his credit justifies.

Sixth: The same section provides that no certificates of stock shall be issued until fully paid, while a member of an ordinary corporation would be entitled to a certificate at any time which he could convince the secretary of his ability to pay, either at present or in the future, for same.

Seventh: The same section provides that no person shall be allowed to own any stock except by consent of the

board of directors, while the stock of ordinary concerns may be purchased upon the market by anyone who may be able to agree with the seller.

Eighth: The same section provides that not more than 5 per cent of stock and not more than $500.00 can be owned by one person, while the ordinary concern, either partnership or corporation, can be owned *in toto* by any person able to purchase and own same.

Ninth: The voting rights of the stockholders are restricted to one vote, regardless of the amount of stock or the interest possessed, while other corporations in the same business, the right to vote is determined by the amount of stock owned.

Tenth: The statute, in Section 5647, makes the board of directors personally and individually liable for indebtedness of the concern in excess of the amount of subscribed capital stock and surplus, while ordinary concerns the liability of a shareholder is only to the extent of his share.

Eleventh: Section 5649 declares it shall be illegal for the directors of any such corporation to declare or pay any dividends or portion of earnings or profit to members or non-members when the corporation is insolvent, or when it would be rendered insolvent by such payment, and provides that the board of directors shall be jointly and severally liable for all the debts of the corporation, then existing, for any such payment.

Twelfth: Section 5648 requires the placing of not less than 10 per cent of any earnings accruing in a surplus or reserve fund until such fund shall equal not less than 50 per cent of the paid-up capital stock, which would require five years. There is no such requirement as to the operation of an ordinary gin or ordinary person, individual or corporation.

Thirteenth: The same section restricts dividends payable upon stock to 6 per cent per annum, while the ordinary corporation is unlimited in the amount of dividends, and it is well known that in some instances they realize and pay out in excess of 100 per cent per annum.

Fourteenth: This section also provides that 5 per cent of the earnings may be set aside for educational purposes, whereas no such provision is made or suggested with respect to the operation of the ordinary gin operator.

Fifteenth: The same section provides that the remainder of such net earnings and profit shall be apportioned and paid to the members ratably upon the amount of the production or amount of the patronage of such members.

Sixteenth: The section further provides that the association may apportion such earnings to non-members upon the basis of the amount of patronage.

Seventeenth: The act restricts the use of the word

"co-operative" to persons organizing under the provisions thereof.

Eighteenth: The act further provides that upon the violation of any such concerns of any of the provisions of the act, that the charter may be forfeited and withdrawn.

These distinctions and their bases are all set forth in the answer filed to the bill in the lower court, and are found at pages 15, 16, 17 and 18 of the record, and they are nowhere denied.

The lower court, composed of the three judges, recited at considerable length the disinguishing characteristics of a co-operative concern organized either under the 1917 statute (Article 16, Chapter 34, C. O. S. 1921), or under the 1919 statute, and which justified the Legislature in making the classification which they made in the amendment to the statute under consideration (R. 39-40. Also R. 47-48-49-50-51-52-53-54), particulary with respect to the 1919 Act, which is Article 19 of Chapter 34, C. O. S. 1921. The Court, after discussing these distinguishing characteristics, said:

> "A gin organized under the Act of 1919 'to be run co-operatively,' does not render said proviso repugnant to the Fourteenth Amendment to the Federal Constitution."

In such an organization as is provided for, we see an attempt upon the part of the Legislature to provide a method and means which may incidentally redound to the

benefit of the cotton growers of the State, but which permits any person, regardless of his occupation, to take advantage of the same provision. It contemplates that those persons so desiring may associate themselves together for the purpose of mutual benefit, restricting the amount of profit to be enjoyed, providing for educational benefits and providing for some benefits to non-members, providing such non-members may choose to patronize such a concern. In the language of one of the decisions cited heretofore: "In so doing we believe that the Legislature knows what they were about," and that this Court will not, in the face of the authorities referred to herein, all of which lay down the principle that courts should not interfere with legislative discretion unless the classification and the legislation is so apparently unreasonable, arbitrary and oppressive as not to be able to esape the conclusion that it clearly violates the provision of the constitutional amendment, grant the relief prayed for.

It is a fundamental proposition of law that courts will take judicial notice of conditions affecting the agricultural interests of the country. *Tobacco Growers Co-op. Assn.* v. *Jones,* 185 N. C. 265, 117 S. C. 174; *Liberty Warehouse Co.* v. *Burley Tobacco Growers Co-op. Assn.* 271 S. W. 695; *Minnesota Wheat Growers Co-op. Marketing Assn.* v. *Huggins,* 203 N. W. 420.

Moreover, the Legislature of the State of Oklahoma,

composed of representatives from various districts of the State of Oklahoma, familiar with conditions in every portion of the State with respect to agricultural conditions and with respect to the evil to be corrected, under the decisions, certainly ought to be supported in their judgment as to just what provision would be necessary in order to strike at the evil existing. Also, the three Federal Judges composing the special court, were men more or less familiar with the conditions sought to be relieved, and their judgment is worthy of consideration in that respect. They have twice upheld the act by their unanimous decisions, the first of which decision has already been sustained by this Court: *Frost* v. *Corporation Commission,* 274 U. S. 719, 47 Sup. Ct. Rep. 589, 71 L. ed. —. The Supreme Court of the State of Oklahoma supporting this statute, is composed of judges, all citizens of the State of Oklahoma from the various districts which they represent, and who have a special knowledge of the conditions with respect to the relationship as between the cotton grower and ginning and seed crusher interests. Their judgment is worthy of careful and serious consideration.

As referred to in the American Sugar Refinery case, *supra,* as well as other cases, Congress itself has repeatedly legislated upon matters in which they distinguish and classify as between the right of the producer who might desire to manufacture his product and the manufacturer merely engaged in manufacture. Also in the Sherman Anti-

Trust Act, distinctions are made, based upon the desire of Congress to favor agricultural interests. Also in the Income Tax Statute of 1921, and in Section 231 of said Act, farmers' co-operative associations, such as may be organized under the 1919 statute, are expressly exempt from income tax payments.

CONCLUSION.

It is, therefore, respectfully submitted that the special court composed of three Federal Judges for the Western District of Oklahoma, should be sustained in this appeal in its denial of the temporary injunction.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 60.—October Term, 1928.

W. A. Frost, doing business under the name of Mitchell Gin Company, Appellant,
vs.
Corporation Commission of the State of Oklahoma, Fred Capshaw, Frank Carter, et al., etc., et al.

Appeal from the District Court of the United States for the Western District of Oklahoma.

[February 18, 1929.]

Mr. Justice Sutherland delivered the opinion of the Court.

Appellant owns a cotton ginning business in the city of Durant, Oklahoma, which he operates under a permit from the State Corporation Commission. By a statute of Oklahoma, originally passed in 1915 and amended from time to time thereafter, cotton gins are declared to be public utilities and their operation for the purpose of ginning seed cotton to be a public business. Comp. Stats. 1921, § 3712. The commission is empowered to fix their charges and to regulate and control them in other respects. § 3715. No gin can be operated without a license from the commission, and in order to secure such license there must be a satisfactory showing of public necessity. § 3714 as amended by c. 109, Session Laws, 1925. The only substantial amendment to this section made by the act of 1925 is to add the proviso: "provided, that on the presentation of a petition for the establishment of a gin to be run co-operatively, signed by one hundred (100) citizens and tax payers of the community where the gin is to be located, the Corporation Commission shall issue a license for said gin."

By an act of the State Legislature passed in 1917 (Comp. Stats. 1921, § 5599) co-operative agricultural or horticultural associations not having capital stock or being conducted for profit, may be formed for the purpose of mutual help by persons engaged in agriculture or horticulture. Under a statute passed in 1919 (Comp. Stats. 1921, § 5637, *et seq.*) ten or more persons may form

a corporation for the purpose of conducting, among others, an agricultural or horticultural business upon a co-operative plan. A corporation thus formed is authorized to issue capital stock to be sold at not less than its par value. The number of shares which may be held by one person, firm or corporation is limited. Dividends may be declared by the directors at a rate not to exceed eight per cent. per annum. Provision is made for setting aside a surplus or reserve fund; and five per cent. may be set aside for educational purposes. The remainder of the profits of the corporation must be apportioned and paid to its members ratably upon the amounts of the products sold to the corporation by its members and the amounts of the purchases of members from the corporation; but the corporation may adopt by-laws providing for the apportionment of such profits in part to non-members upon the amounts of their purchases and sales from or to the corporation.

The Durant Co-operative Gin Company, one of the appellees, was organized in 1926 under the act of 1919. After its incorporation, the company made an application to the commission for a permit to establish a cotton gin at Durant, accompanying its application with a petition signed by 100 citizens and taxpayers, as required by the statutory proviso above quoted. Appellant protested in writing against the granting of such permit and there was a hearing. The commission, at the hearing, rejected an offer to show that there was no public necessity for the establishment of an additional gin at Durant, and held that the proviso made it mandatory to grant the permit applied for without regard to necessity. Thereupon appellant brought this suit to enjoin the commission from issuing the permit prayed for and to enjoin the Durant company from the establishment of a cotton gin at Durant, upon the ground that the proviso, as construed and applied by the commission (see *Mont. Bank* v. *Yellowstone County*, 276 U. S. 499, 504), was invalid as contravening the due process and equal protection of the law clauses of the Fourteenth Amendment. The court below, consisting of three judges under § 266 Judicial Code, denied the prayer for an injunction and entered a final decree dismissing the bill. 26 F. (2d) 508.

1. We first consider the preliminary contention made on behalf of appellees that appellant has no property right to be affected by operations of the Durant company and, therefore, no standing

to invoke the provisions of the Fourteenth Amendment or to appeal to a court of equity.

It already appears that cotton gins are declared by the Oklahoma statute to be public utilities and their operation for the purpose of ginning seed cotton to be public business. No one can operate a cotton gin for such purpose without securing a permit from the commission. In their regulation and control, the commission is given the same authority which it has in respect of transportation and transmission companies, and the same power to fix rates, charges and regulations. Comp. Stats. 1921, §§ 3712, 3713, 3715. Under § 3714 as amended, *supra* (laying the proviso out of consideration for the moment) the commission may deny a permit for the operation of a gin where there is no public necessity for it, and may authorize a new ginning plant only after a showing is made that such plant is a needed utility. Both parties definitely concede the validity of these provisions, and, for present purposes at least, we accept that view.

It follows that the right to operate a gin and to collect tolls therefor, as provided by the Oklahoma statute, is not a mere license, but a franchise, granted by the state in consideration of the performance of a public service; and as such it constitutes a property right within the protection of the Fourteenth Amendment. See *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 9; *California* v. *Pacific Railroad Co.*, 127 U. S. 1, 40-41; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 328, 329; *Owensboro* v. *Cumberland Telephone Co.*, 230 U. S. 58, 64-66; *Boise Water Co.* v. *Boise City*, 230 U. S. 84, 90-91; *McPhee & McGinnity Co.* v. *Union Pac. R. Co.*, 158 Fed. 5, 10-11.

In *California* v. *Pacific Railroad Co., supra*, pp. 40-41, a franchise is defined as

"a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. . . . No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. . . . The list might be continued indefinitely."

Specifically, the foregoing authorities establish that the right to supply gas or water to a municipality and its inhabitants, the right to carry on the business of a telephone system, to operate a railroad, a street railway, city water works or gas works, to build a bridge, operate a ferry, and to collect tolls therefor, are franchises. And these are but illustrations of a more comprehensive list, from which it is difficult, upon any conceivable ground, to exclude a cotton gin, declared by statute to be a public utility engaged in a public business, the operation of which is precluded without a permit from a state governmental agency, and which is subject to the same authority as that exercised over transportation and transmission companies in respect of rates, charges and regulations. Under these conditions, to engage in the business is not a matter of common right, but a privilege, the exercise of which, except in virtue of a public grant, would be in derogation of the state's power. Such a privilege, by every legitimate test, is a franchise.

Appellant, having complied with all the provisions of the statute, acquired a right to operate a gin in the city of Durant by valid grant from the state acting through the corporation commission. While the right thus acquired does not preclude the state from making similar valid grants to others, it is, nevertheless, exclusive against any person attempting to operate a gin without obtaining a permit or, what amounts to the same thing, against one who attempts to do so under a void permit; in either of which events the owner may resort to a court of equity to restrain the illegal operation upon the ground that such operation is an injurious invasion of his property rights. 6 Pomeroy's Equity Jurisprudence, 3d Ed., (2 Equitable Remedies) § § 583, 584; *People's Transit Co.* v. *Henshaw*, 20 F. (2d) 87, 90; *Bartlesville El. L. & P. Co.* v. *Bartlesville I. R. Co.*, 26 Okla. 453; *Patterson* v. *Wollmann*, 5 N. D. 608, 611; *Millville Gas L. Co.* v. *Vineland L. & P. Co.*, 72 N. J. Eq. 305, 307. The injury threatened by such an invasion is the impairment of the owner's business, for which there is no adequate remedy at law.

If the proviso dispensing with a showing of public necessity on the part of the Durant and similar companies is invalid as claimed, the foregoing principles afford a sufficient basis for the maintenance of the present suit, against not only the Durant company, but the members of the commission who threaten to issue a permit

for the establishment of a new gin by that company without a showing of public necessity.

2. Is, then, the effect of the proviso to deny appellant the equal protection of the laws within the meaning of the Fourteenth Amendment? As the proviso was construed and applied by the commission and by the court below, its effect is to relieve all corporations organized under the act of 1919 from an onerous restriction upon the right to engage in a public business which is imposed by the statute upon appellant and other individuals, as well as corporations organized under general law, engaging in such business. That a greater burden thereby is laid upon the latter than upon the former is clear. Immunity to one from a burden imposed upon another is a form of classification and necessarily results in inequality; but not necessarily that inequality forbidden by the Constitution. The inequality thus prohibited is only such as is actually and palpably unreasonable and arbitrary. *Arkansas Gas Co.* v. *Railroad Comm.*, 261 U. S. 379, 384, and cases cited.

The purpose of the clause in respect of equal protection of the laws is to rest the rights of all persons upon the same rule under similar circumstances. *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, 37. This Court has several times decided that a corporation is as much entitled to the equal protection of the laws as an individual. *Quaker City Cab Co.* v. *Penna.*, 277 U. S. 389, 400; *Kentucky Co.* v. *Paramount Exch.*, 262 U. S. 544, 550; *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150, 154. The converse, of course, is equally true. A classification which is bad because it arbitrarily favors the individual as against the corporation certainly cannot be good when it favors the corporation as against the individual. In either case, the classification, in order to be valid, "'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415; *Air-way Corp.* v. *Day*, 266 U. S. 71, 85; *Schlesinger* v. *Wisconson*, 270 U. S. 230, 240. That is to say, *mere* difference is not enough: the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150, 155." *Louisville Gas Co.* v. *Coleman*, *supra*, p. 37.

By the terms of the statute here under consideration, appellant, an individual, is forbidden to engage in business unless he can first show a public necessity in the locality for it; while corporations organized under the act of 1919, however numerous, may engage in the same business in the same locality no matter how extensively the public necessity may be exceeded. That the immunity thus granted to the corporation is one which bears injuriously against the individual does not admit of doubt, since by multiplying plants without regard to necessity the effect well may be to deprive him of business which he would otherwise obtain if the substantive provision of the statute were enforced.

It is important to bear in mind that the Durant company was not organized under the act of 1917, but under that of 1919. The former authorizes the formation of an association for mutual help, without capital stock, not conducted for profit, and restricted to the business of its own members, except that it may act as agent to sell farm products and buy farm supplies for a non-member, but as a condition may impose upon him a liability, not exceeding that of a member, for the contracts, debts and engagements of the association, such services to be performed at the actual cost thereof including a pro rata part of the overhead expenses. Comp. Stats. 1921, § 5608. Under this exception, the difference between a non-member and a member is not of such significance or the authority conferred of such scope as to have any material effect upon the general purposes or character of the corporation as a mutual association. As applied to corporations organized under the 1917 act, we have no reason to doubt that the classification created by the proviso might properly be upheld. *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89; *Warehouse Co.* v. *Tobacco Growers,* 276 U. S. 71. A corporation organized under the act of 1919, however, has capital stock, which, up to a certain amount, may be subscribed for by any person, firm or corporation; is allowed to do business for others; to make profits and declare dividends, not exceeding eight per cent. per annum; and to apportion the remainder of its earnings among its members ratably upon the amount of products sold by them to the corporation. Such a corporation is in no sense a mutual association. Like its individual competitor, it does business with the general public for the sole purpose of making money. Its members need not even be cotton growers.

They may be—all or any of them—bankers or merchants or capitalists having no interest in the business differing in any respect from that of the members of an ordinary corporation. The differences relied upon to justify the classification are, for that purpose, without substance. The provision for paying a portion of the profits to members or, if so determined, to non-members, based upon the amounts of their sales to or purchases from the corporation, is a device which, without special statutory authority, may be and often is resorted to by ordinary corporations for the purpose of securing business. As a basis for the classification attempted, it lacks both relevancy and substance. Stripped of immaterial distinctions and reduced to its ultimate effect, the proviso, as here construed and applied, baldly creates one rule for a natural person and a different and contrary rule for an artificial person, notwithstanding the fact that both are doing the same business with the general public and to the same end, namely, that of reaping profits. That is to say, it produces a classification which subjects one to the burden of showing a public necessity for his business, from which it relieves the other, and is essentially arbitrary, because based upon no real or substantial differences having reasonable relation to the subject dealt with by the legislation. *Power Co.* v. *Saunders*, 274 U. S. 490, 493; *Louisville Gas Co.* v. *Coleman*, *supra*, p. 39; *Quaker City Cab Co.* v. *Penna*, *supra*, p. 402.

3. The further question must be answered: Are the proviso and the substantive provisions which it qualifies separable, so that the latter may stand although the former has fallen? If the answer be in the negative, that is to say, if the parts of the statute be held to be inseparable, the decree below should be affirmed, since, in that event, although the proviso be bad, the inequality created by it would disappear with the fall of the entire statute and no basis for equitable relief would remain. But for reasons now to be stated we are of opinion that the substantive provisions of the statute are severable and may stand independently of the proviso.

If § 3714 *as originally passed* had contained the proviso, the effect would be to render the entire section invalid, because then the result of upholding the substantive part of the section notwithstanding the invalidity of the proviso would have been to make applicable to the Durant company and others similarly organized, the requirement in respect of a showing of public necessity, al-

though the legislative will contemporaneously expressed as part of the same act was to the contrary. In this state of the matter, to hold otherwise would be to extend the scope of the law in that regard so as to embrace corporations which the legislature passing the statute had, by its very terms, expressly excluded, and thus to go in the face of the rule that where the excepting proviso is found unconstitutional the substantive provisions which it qualifies cannot stand. *Davis* v. *Wallace,* 257 U. S. 478, 484. "For all the purposes of construction [the proviso] is to be regarded as part of the act. The *meaning* of the legislature must be gathered from all they have said, as well from that which is ineffective for want of power, as from that which is authorized by law." *State ex rel. McNeal* v. *Dombaugh,* 20 Ohio St. 167, 174-175.

But the proviso here in question was not in the original section. It was added by way of amendment many years after the original section was enacted. If valid, its practical effect would be to repeal by implication the requirement of the existing statute in respect of public necessity insofar as the Durant and similar corporations are concerned. But since the amendment is void for unconstitutionality, it cannot be given that effect, "because an existing statute cannot be recalled or restricted by anything short of a constitutional enactment." *Davis* v. *Wallace, supra,* p. 485.

To this effect also is *Truax* v. *Corrigan,* 257 U. S. 312, 341-342. In that case there had been in force in Arizona, both as a state and a territory, for many years, a general statute granting authority to judges of the courts of first instance to issue writs of injunction. The statute was amended so as to except from its operation certain cases between employers and employees. The amendment was declared invalid as denying the equal protection of the laws; but the general provision of the statute as it originally stood was upheld upon the ground that it had been in force for many years and that an exception in the form of an unconstitutional amendment could not be given the effect of repealing it. And see *Waters-Pierce Oil Company* v. *Texas,* 177 U. S. 28, 47.

Here it is conceded that the statute, before the amendment, was entirely valid. When passed, it expressed the will of the legislature which enacted it. Without an express repeal, a different legislature undertook to create an exception, but, since that body sought to express its will by an amendment which, being unconsti-

tutional, is a nullity and, therefore, powerless to work any change in the existing statute, that statute must stand as the only valid expression of the legislative intent.

In passing upon a similar situation, the Supreme Court of Michigan, speaking through Judge Cooley, in *Campau* v. *Detroit*, 14 Mich. 276, 286, said: "But nothing can come in conflict with a nullity, and nothing is therefore repealed by this act on the ground solely of its being inconsistent with a section of this law which is entirely unconstitutional and void." In *Carr, Auditor* v. *State ex rel. Coetlosquet*, 127 Ind. 204, 215, the state supreme court disposed of the same point in these words: "We suppose it clear that no law can be changed or repealed by a subsequent act which is void because unconstitutional. . . . An act which violates the Constitution has no power and can, of course, neither build up nor tear down. It can neither create new rights nor destroy existing ones. It is an empty legislative declaration without force or vitality." See also *People* v. *Butler Street Foundry*, 201 Ill. 236, 257-259; *People* v. *Fox*, 294 Ill. 263, 269; *McAllister* v. *Hamlin*, 83 Cal. 361, 365; *State ex rel.* v. *Mills*, 231 Mo. 493, 498-499; *Ex parte Davis*, 21 Fed. 396, 397. The question is not affected by the fact that the amendment was accomplished by inserting the proviso in the body of the original section and reenacting the whole at length. *Truax* v. *Corrigan, supra; People* v. *Butler Street Foundry, supra*, pp. 258-259; *State ex rel.* v. *Mills, supra*, p. 499.

4. It is true that appellant applied for and obtained a permit to do business under the statute to which it was sought to attach the proviso in question. Is he, thereby, precluded from assailing the proviso upon the ground that one who claims the benefit of a statute may not assert its invalidity? It is not open to question that one who has acquired rights of property necessarily based upon a statute may not attack that statute as unconstitutional, for he cannot both assail it and rely upon it in the same proceeding. *Hurley* v. *Commission of Fisheries*, 257 U. S. 223, 225. But here the proviso under attack, having been adopted by a subsequent act and being invalid, had no effect, as we have already said, upon the provisions of the statute. As applied to this case, it began and ended as a futile attempt by the legislature to bring about a change in the law which a previous legislature had enacted. For this pur-

pose, and as construed and applied below, it was a nullity, wholly "without force or vitality," leaving the provisions of the existing statute unchanged. It necessarily results that appellant's rights came into being and owed their continued existence wholly to that statute, disconnected from the ineffective proviso, and it is that statute, so disconnected, which measures the extent to which he may enjoy and defend such rights. In seeking and obtaining the benefits of the statute, appellant proceeded without regard to the proviso, neither affirming nor denying nor in contemplation of law acquiescing in its validity; and his action cannot be made a basis upon which to rest a successful claim of an estoppel *in pais* or of a waiver of the right to maintain the constitutional challenge here made.

We conclude: That the proviso is unconstitutional as contravening the equal protection clause of the Fourteenth Amendment; that the remainder of the statute is separable and affords the sole rule in respect of the questions here to be determined; that the corporation commission is without power to issue permits to corporations organized under the act of 1919 without a showing of public necessity; that the Durant company is without authority to do business in the absence of a permit thus issued; and that appellant is entitled to the relief for which he prays.

Decree reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 60.—October Term, 1928.

W. A. Frost, doing business under the name of Mitchell Gin Co., Appellant, *vs.* Corporation Commission of the State of Oklahoma, Fred Capshaw et al.	Appeal from the District Court of the United States for the Western District of Oklahoma.

[February 18, 1929.]

Mr. Justice Brandeis, dissenting.

Under § 3714 of Oklahoma Compiled Statutes 1921, as amended by c. 109 of the Laws of 1925, Frost secured from the Corporation Commission a license to operate a cotton gin in the City of Durant.* Later, the Durant Co-operative Gin Company applied to the Commission under that statute for a license to operate a gin in the same city. In support of its application, it presented a certificate of organization under Chapter 147 of the laws of 1919 entitled "An Act providing for the organization and regulation of cooperative corporations." (Oklahoma Compiled Statutes 1921, Secs. 5637-5652) and a petition signed by one hundred citizens and taxpayers of that community requesting that the license be issued. Frost objected to the granting of a license, on the ground that there was no necessity for an additional gin in that city. The Commission ruled that, upon the showing made, it was obliged by § 3714 as so amended to issue a license, without hearing evidence as to necessity; and indicated its purpose to issue the license. Thereupon, Frost brought this suit under § 266 of the Judicial Code against the Com-

*The stipulation of facts states: "That W. A. Frost is engaged in the cotton ginning business under the name of Mitchell Gin Company and owns and operates a cotton gin in the City of Durant, Oklahoma; that said gin is operated under and by virtue of license duly issued by the Corporation Commission of the State of Oklahoma under and by virtue of Article 40, Chapter 7, Compiled Oklahoma Statutes, 1921, as amended by Chapter 191, Session Laws of Oklahoma of 1923 and by Chapter 109 of the Session Laws of Oklahoma of 1925."

mission, the Attorney General and the Durant Company to enjoin granting the license. A restraining order issued upon the filing of the bill.

The case was first heard by three judges upon application for an interlocutory injunction and upon defendants' motion to dismiss. Frost contended that his license had conferred a franchise; that from it there arose in him the property right to be protected against further local competition, unless existing ginning facilities were inadequate; that in the absence of a showing of necessity competition by the Durant Company would be illegal; and that to issue a license which authorized such competition would take Frost's property without due process of law and deny to him the equal protection of the law. The District Court denied both the injunction and the motion to dismiss; and it dissolved the restraining order. Upon direct appeal by Frost, this Court affirmed the interlocutory decree *per curiam* in *Frost* v. *Corporation Commission*, 274 U. S. 719, on the authority of *Chicago Great Western Ry. Co.* v. *Kendall*, 266 U. S. 94, 100. Thereupon, the facts being stipulated, the case was submitted in the District Court on final hearing to the same judges; and a decree was entered dismissing the bill, 26 F. (2d) 508. This appeal presents the same questions which were argued on the appeal from the interlocutory decree.

Under the Oklahoma Act of 1907 cotton gins were held subject to regulation by the Corporation Commission.[1] In 1915, the Legislature declared them public utilities and restriction of competition was introduced by prohibiting operation of a gin without a license from the Commission. That statute required that a license issue for proper gins already established, but directed that none should issue for a new gin in any community already adequately supplied, except upon "the presentation of a petition signed by not less than fifty farmer petitioners of the immediate vicinity." Session Laws 1915, c. 176 (Oklahoma Compiled Statutes 1921, §§ 3712-3718). Chapter 191 of the Session Laws of 1923 struck out of § 3714 the provision referring to farmers. But in 1925 there was inserted in lieu thereof the proviso "that on the presentation of a petition for the establishment of a gin to be run co-operatively, signed by

[1]Session Laws 1907-08, p. 756 (Comp. Stat. 1921, § 11032). See Oklahoma Gin Co. *v.* State, 158 Pac. 629; Mascho *v.* Chandler Cotton Oil Co., 7 Annual Corp. Comm. Report 370. Compare Harriss-Irby Cotton Co. *v.* State, 31 Okla. 603.

one hundred (100) citizens and taxpayers of the community where the gin is to be located, the Corporation Commission shall issue a license for said gin." Session Laws 1925, c. 109. In 1926, the Supreme Court of Oklahoma held in *Choctaw Cotton Oil Co.* v. *Corporation Commission,* 121 Okl. 51, 52, that a corporation organized under Chapter 147 of the Laws of 1919 was run cooperatively within the meaning of § 3714 as so amended.

The attack upon the statute is rested mainly upon the contention that by requiring issuance of a license to so-called co-operative corporations organized under the law of 1919, the statute as amended in 1925 creates an arbitrary classification. The classification is said to be arbitrary, because the differences between such concerns and commercial corporations or individuals engaged in the same business are in this connection not material. The contention rests, I think, upon misapprehensions of fact. The differences are vital; and the classification is a reasonable one. Before stating why I think so, other grounds for affirming the judgment should be mentioned.

First. The bill alleges, and the parties have stipulated, that Frost was licensed under § 3714 of the Compiled Statutes as amended by the Act of 1925. The stipulation does not show that prior to the amendment he held any license. His alleged property right to conditional immunity from competition rests wholly on the statute now challenged. It is settled that one cannot in the same proceeding both rely upon a statute and assail it. *Hurley* v. *Commission of Fisheries,* 257 U. S. 223, 225. Compare *Great Falls Mfg. Co.* v. *Atty. General,* 124 U. S. 581, 598-599; *Wall* v. *Parrot Silver & Copper Co.,* 244 U. S. 407, 411-412; *St. Louis Co.* v. *Prendergast Co.,* 260 U. S. 469, 472-473; *Buck* v. *Kuykendall,* 267 U. S. 307, 316; *Booth Fisheries Co.* v. *Industrial Commission,* 271 U. S. 208, 211; *United Fuel Gas Co.* v. *Railroad Commission,* No. 1, October Term, 1928, decided January 2, 1929. This established rule requires affirmance of the judgment below.

Second. Frost claims that to grant a license to the Durant Company without a showing of public necessity would involve taking his property without due process. The only property which he asserts would be so taken is the alleged right to be immune from the competition of persons operating without a valid license. But for the statute, he would obviously be subject to competition from

anyone. Whether the license issued to him under § 3714 conferred upon him the property right claimed is a question of statutory construction—and thus, ordinarily, a question of state law. "Whether state statutes shall be construed one way or another is a state question, the final decision of which rests with the courts of the State." *Hebert* v. *Louisiana*, 272 U. S. 312, 316. In the absence of a decision of the question by the highest court of the State, this Court would be obliged to construe the statute; and in doing so it might be aided by consideration of the decisions of courts of other States dealing with like statutes. But the Supreme Court of Oklahoma has decided the precise question in *Choctaw Cotton Oil Co.* v. *Corporation Commission*, 121 Okl. 51, 52. It held that a license under § 3714 does not confer the property right claimed, saying: "What property rights are taken from petitioners by licensing another gin, under the foregoing proviso? What rights of any kind could the licensing of another gin affect? It does not disturb the property of petitioners, nor prevent the free operation of their gins. The only right which could be affected by such license is the right of petitioners to operate their gin without competition, a right which is not secured to them either by the state or federal Constitution, hence the contention as to taking their property without due process of law cannot be sustained." As no property right of Frost is invaded—his suit must fail, however objectionable the statute may be.

Third. Frost claims that to issue a license to the Durant Company without a showing of necessity would violate the equality clause. Whether the license was issued to Frost upon a showing of necessity does not appear. The mere granting of a license to the Durant Company later on different, and perhaps easier, terms would not violate Frost's constitutional right to equality, since he has already secured his license under the statute as written. The fact that someone else similarly situated may hereafter be refused a license, and would be thereby discriminated against, is obviously not of legal significance here. *Southern Railway Co.* v. *King*, 217 U. S. 524; *Standard Stock Food Co.* v. *Wright*, 225 U. S. 540; *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571; *Arkadelphia Co.* v. *St. Louis S. W. Ry. Co.*, 249 U. S. 134, 149; *Liberty Warehouse Co.* v. *Tobacco Growers*, 276 U. S. 71.

Fourth. Frost claims on another ground that his constitutional rights have been violated. He says that what the statute and the Supreme Court of Oklahoma call a license is in law a franchise; that a franchise is a contract; that where a constitutional question is raised this Court must determine for itself what the terms of a contract are; and that this franchise should be construed as conferring the right to the conditional immunity from competition which he claims. None of the cases cited lend support to the contention that the license here issued is a franchise.[2] They hold merely that subordinate political bodies, as well as a legislature, may grant franchises; and that violations of franchise rights are remediable, whoever the transgressor. Moreover, the limited immunity from competition claimed as an incident of the license was obviously terminable at any moment. Compare *Louisville Bridge Co.* v. *United States*, 242 U. S. 409. It was within the power of the legislature, at any time after the granting of Frost's license, to abrogate the requirement of a certificate of necessity, thus opening the business to the competition of all comers. It is difficult to see how the lesser enlargement of the possibilities of competition by a license granted under the 1925 proviso could operate as a denial of constitutional rights.

It must also be borne in mind that a franchise to operate a public utility is not like the general right to engage in a lawful business, part of the liberty of the citizen; that it is a special privilege which does not belong to citizens generally; that the State may, in the exercise of its police power, make that a franchise or special privilege which at common law was a business open to all;[3] that a special privilege is conferred by the State upon selected persons; that it is of the essence of a special privilege that the franchise may be

[2]Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1, 9; California *v.* Pacific Railroad Co., 127 U. S. 1, 40-41; Monongahela Navigation Co. *v.* United States, 148 U. S. 312, 328-329; Owensboro *v.* Cumberland Telephone Co., 230 U. S. 58, 64-66; Boise Water Co. *v.* Boise City, 230 U. S. 84, 90-91; McPhee & McGinnity Co. *v.* Union Pac. R. Co., 158 Fed. 5, 10-11. California *v.* Pacific Railroad Co., 127 U. S. 1, 40-41, merely describes the types of interprises which may be made the subject of a franchise. The enterprises mentioned are all of the type which require the use of public property so that the permission of the State is required to condone what would otherwise be a trespass. Further, it is not maintained that the State is restricted to the issuance of franchises for the carrying on of such callings.

[3]Noble State Bank *v.* Haskell, 219 U. S. 104, 112-113.

granted or withheld at the pleasure of the State; that it may be granted to corporations only, thus excluding all individuals;[4] and that the Federal Constitution imposes no limits upon the State's discretion in this respect.[5] In *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, the plaintiff, claiming an exclusive franchise, sought to enjoin the competition of the defendant. The Court said (p. 659), " 'The right to operate gas-works, and to illuminate a city, is not an ancient or usual occupation of citizens generally. No one has the right to . . carry on the business of lighting the streets . . without special authority from the sovereign. It is a franchise belonging to the State, and, in the exercise of the police power, the State could carry on the business itself or select one or several agents to do so.' " The demurrer to the bill was dismissed. In *New Orleans Water-Works Co.* v. *Rivers*, 115 U. S. 674, on similar facts in deciding for the plaintiff, the Court said (p. 682), "The restriction, imposed by the contract upon the use by others than plaintiff of the public streets and ways, for such purposes, is not one of which the appellee can complain. He was not thereby restrained of any freedom or liberty he had before . . ." One who would strike down a statute must show not only that he is affected by it, but that as applied to him, the statute exceeds the power of the State. This rule, acted upon as early as *Austin* v. *The Aldermen*, 7 Wall. 694, and definitely stated in *Supervisers* v. *Stanley*, 105 U. S. 305, 314, has been consistently followed since that time.

Fifth. Frost's claim that the Act of 1925 discriminates unjustifiably is not sound. The claim rests wholly on the fact that individuals and ordinary corporations must show inadequacy of existing facilities, while co-operatives organized under the Act of 1919 may secure a license without making such a showing, if the application is supported by a petition of one hundred persons who are citizens and taxpayers in the community. It is settled that to provide specifically for peculiar needs of farmers or producers is a reasonable basis of classification, *American Sugar Refining Co.* v.

[4]Shallenberger *v.* First State Bank, 219 U. S. 114; Dillingham *v.* McLaughlin, 264 U. S. 370. Compare Assaria State Bank *v.* Dolley, 219 U. S. 121; German Alliance Ins. Co. *v.* Kansas, 233 U. S. 389, 416.

[5]Bank of Augusta *v.* Earle, 13 Pet. 519, 595; People's Railroad *v.* Memphis Railroad, 10 Wall. 38, 51; California *v.* Pacific Railroad Co., 127 U. S. 1, 40-41; Denver *v.* New York Trust Co., 229 U. S. 123, 141-142.

Louisiana, 179 U. S. 89; *Liberty Warehouse Co.* v. *Tobacco Growers*, 276 U. S. 71. And it is conceded that the classification made by the Act of 1925 would be reasonable if it had been limited to co-operatives organized under Chapter 22 of the Laws of 1917. Thus the contention that the classification is arbitrary is directed only to co-operatives organized under the law of 1919. It rests upon two erroneous assumptions: (1) That co-operatives organized under the law of 1919 are substantially unlike those organized under Chapter 22 of the Laws of 1917; and (2) that there are between co-operative corporations under the law of 1919 and commercial corporations no substantial differences having reasonable relation to the subject dealt with by the gin legislation.

The assertion is that co-operatives organized under the law of 1919, being stock companies, do business with the general public for the sole purpose of making money, as do individual or other corporate competitors; whereas co-operatives organized under the law of 1917 are "for mutual help, without capital stock, not conducted for profit, and restricted to the business of their own members". The fact is that these two types of co-operative corporations—the stock and the nonstock—differ from one another only in a few details, which are without significance in this connection; that both are instrumentalities commonly employed to promote and effect co-operation among farmers; that the two serve the same purpose; and that both differ vitally from commercial corporations. The farmers seek through both to secure a more efficient system of production and distribution and a more equitable allocation of benefits. But this is not their only purpose. Besides promoting the financial advantage of the participating farmers, they seek through co-operation to socialize their interests—to require an equitable assumption of responsibilities while assuring an equitable distribution of benefits. Their aim is economic democracy on lines of liberty, equality and fraternity. To accomplish these objectives, both types of co-operative corporations provide for excluding capitalist control. As means to this end, both provide for restriction of voting privileges, for curtailment of return on capital and for distribution of gains or savings through patronage dividends or equivalent devices.

In order to ensure economic democracy, the Oklahoma Act of 1919 prevents any person from becoming a shareholder without the consent of the board of directors. It limits the amount of

stock which one person may hold to $500. And it limits the voting power of a shareholder to one vote. Thus, in the Durant Company, the holder of a single share of the par value of $10 has as much voting power as the holder of 50 shares. The Act further discourages entrance of mere capitalists into the co-operative by provisions which permit five per cent of the profits to be set aside for educational purposes; which require ten per cent of the profits to be set aside as a reserve fund, until such fund shall equal at least fifty per cent of the capital stock; which limit the annual dividends on stock to eight per cent; and which require that the rest of the year's profits be distributed as patronage dividends to members, except so far as the directors may apportion them to non-members.

The provisions for the exclusion of capitalist control of the non-stock type of co-operative organized under the Oklahoma Act of 1917 do not differ materially in character from those in the 1919 Act. The nonstock co-operative also may reject applicants for membership; and no member may have more than one vote. This type of co-operative is called a non-profit organization; but the term is merely one of art, indicating the manner in which the financial advantage is distributed. This type also is organized and conducted for the financial benefit of its members and requires capital with which to conduct its business. In the stock type the capital is obtained by the issue of capital stock, and members are not subjected to personal liability for the corporation's business obligations. In the nonstock type the capital is obtained partly from membership fees, partly through dues or assessments and partly through loans from members or others. And for fixed capital it substitutes in part personal liability of members for the corporation's obligations.[6] In the stock type there are *eo nomine* dividends on capital and patronage dividends. In the nonstock type the financial benefit is distributed by way of interest on loans and refunds of fees, dues and assessments. And all funds acquired through the co-operative's operations, which are in excess of the amount desirable for a "working fund", are to be distributed

[6]Section 10 makes each member assume "original liability, for his per capita share of all contracts, debts, and engagements of the association existing at the time he becomes a member and created during his membership"; and "additional liability" for his pro rata share of the liability of any other member, whose liability may become uncollectible.

as refunds of fees, dues, and assessments. Both acts allow business to be done for non-members; and though the nonstock association may, it is not required, to impose obligations on the non-member for the liability of the association. Thus, for the purposes here relevant, there is no essential difference between the two types of co-operatives.

The Oklahoma law of 1919 follows closely in its provisions the legislation enacted earlier in other States with a view to furthering farmers' co-operation. The first emergence of any settled policy as to the means to be employed for effecting co-operation among farmers in the United States came in 1875 when, at the annual convention of the National Grange of the Patrons of Husbandry, recommendations were formally adopted endorsing "Rochdale principles"; and a form of rules for the guidance of prospective organizers was promulgated. These provided for stock companies with shares of $5 each; that no member be allowed to hold more than 100 shares; that ownership of a single share shall constitute the holder a member of the association; that only 8 per cent "interest" shall be paid on the capital; that the balance of the profits shall go "either to increase the capital or business of the association, or for any educational or provident purposes authorized by the association", or be distributed as patronage dividends; and that the patronage dividends be distributed among customers, except that non-members should receive only one-half the proportion of members.[7]

The need of laws framed specifically for incorporating farmers' co-operatives being recognized, Massachusetts enacted in 1866 the necessary legislation by a general law which differed materially from that under which commercial organizations were formed. The statute provided for co-operatives having capital stock.[8] Be-

[7]Nourse, The Legal Status of Agricultural Co-operation (1927), *passim*, particularly pp. 11, 21, 35-36.

[8]Mass. St., 1866, c. 290. The type was called Rochdale because it was this type of organization which the pioneers of the present co-operation among English speaking peoples used there. This law which served as a pattern for most of the co-operative incorporation laws passed by other States prior to 1900 contained fewer of the safeguards to assure preservation of co-operative principles than does the Oklahoma Act of 1919. No limitation was placed on the quantum of stock per member or on the voting privileges; and no restriction was placed on the amount of dividends to be paid on stock, the distribution of profits being left entirely to the by-laws and to the directors, save for the requirement that a portion of the earnings go into a reserve fund.

fore 1900, ten other States had enacted laws of like character.[9] After 1900 many such statutes were passed. Now, only two States lack laws making specific provision for the incorporation of farmers' co-operatives.[10] Thirty-three States, at least, have enacted laws providing for the formation of co-operative associations of the stock type. All of them permit a fixed dividend on capital stock, the doing of business for non-members, and the distribution of patronage dividends.[11] Some of them, recognizing the need for elasticity, impose the single requirement that earnings be apportioned in part on a patronage basis, and leave all other provisions for organization and distribution of profits to the by-laws.[12]

Farmers' co-operative incorporation laws of the nonstock type are of much more recent origin; and are fewer in number.[13] The earliest law of this character was the crude measure enacted in Cali-

[9]Pennsylvania, Public Laws 1868, Act 62; Minnesota, Laws 1870, c. 29; Michigan, Acts 1875, No. 75, amending Act 288 of 1865 so as to include agricultural co-operatives; Connecticut, Laws 1875, c. 62; California, Laws 1878, p. 883; New Jersey, Laws 1884, p. 63; Ohio, Laws 1884, p. 54; Kansas, Laws 1887, c. 116; Wisconsin, Laws 1887, c. 126; Montana, 1895, Code (1921), §§ 6375-6385. Tennessee, Laws 1882, c. 8, fails to specify whether the co-operatives to be incorporated thereunder shall be organized with or without capital stock.

[10]Delaware and Vermont. Vermont, however, has a section in her general corporation law which makes provision for co-operative associations.

[11]Arkansas, Acts 1921, p. 702; California, Laws 1878, p. 883; Colorado, Laws 1913, p. 220; Connecticut, Laws 1875, c. 62; Florida, Acts 1917, c. 7384; Georgia, Acts 1920, p. 125; Illinois, Laws 1915, p. 325; Indiana, Laws 1913, c. 164; Iowa, Code (1924) c. 389, §§ 8459-8485; Kansas, Laws 1913, c. 137; Kentucky, Laws 1918, c. 159; Maryland, Laws 1922, c. 197; Massachusetts, Laws 1920, c. 349; Michigan, Acts 1921, No. 84, c. 4; Minnesota, Mason's Stats. (1927) § 7822-7847; Missouri, Laws 1919, p. 116; Montana, Code (1921), §§ 6375-6396; Nebraska, Comp. Stats. (1922) § 642-648; New Jersey, Laws 1884, p. 63; New York, Laws 1913, c. 454; North Carolina, Laws 1915, c. 144; North Dakota, Laws 1921, c. 43; Oklahoma, Laws 1919, c. 147; Ohio, Laws 1884, p. 54; Oregon, Oregon Laws Supp. (1927), §§ 6954-6976; Pennsylvania, Public Laws, 1887, Act. 365; Rhode Island, Laws 1916, c. 1400 South Carolina Acts, 1915, No. 152; South Dakota, Laws 1913, c. 145; Tennessee, Laws 1917, c. 142; Virginia, Laws 1914, c. 329; Washington, Laws 1913, p. 50; Wisconsin, Laws 1911, c. 368.

[12]See, for example, Nebraska, Laws 1911, c. 32; Indiana, Laws 1913, c. 164; Colorado, Laws 1913, p. 220; North Dakota, Laws 1915, c. 92; Florida, Acts 1917, c. 7384.

[13]Nourse, The Legal Status of Agricultural Co-operation (1927), pp. 51-72.

fornia in 1895.[14] Statutes of that type have been passed in about sixteen States;[15] but ten of these have also laws of the stock type.[16] The enactment of state laws for the incorporation of nonstock co-operatives and their extensive use in the co-operative marketing of commodities, are due largely to the fact that, prior to 1922, the Clayton Act, October 15, 1914, c. 323, § 6, (38 Stat. 731), limited to nonstock cooperatives the right to make a class of agreements with members which prior thereto would have been void as in restraint of trade.[17] See *Liberty Warehouse Co.* v. *Tobacco Growers*, 276 U. S. 71. Nearly one-half of the existing laws of the nonstock type were enacted between 1914 and 1922.[18] This limitation in the Clayton Act proved to be unwise. By the Capper-Volstead Act of February 18, 1922, c. 57, § 1, (42 Stat. 388), Congress recognizing the substantial identity of the two classes of co-operatives, extended

[14]Laws 1895, c. 183. That this Act did not provide satisfactorily for all types of co-operative endeavor is evidenced by the fact that prior to the passage of the Clayton Act (which offered substantial advantages to nonstock corporations) several of California's largest cooperatives did not incorporate under this or the similar act of 1909 (chap. 26), but were organized on a capital stock basis, e. g., California Fruit Growers' Exchange, California raisin growers. See Nourse, The Legal Status of Agricultural Co-operation, p. 64, note.

[15]Nevada, Stat. 1901, c. 60; Michigan, Public Acts 1903, No. 171; Washington, Laws 1907, p. 255; Alabama, Acts 1909, No. 145, p. 168; California, Laws 1909, c. 26; Florida, Laws 1909, c. 5958; Oregon, Laws 1909, c. 190; Idaho, Laws 1913, c. 54; Colorado, Laws 1915, c. 57; New Mexico, Laws 1915, c. 64; Oklahoma, Laws 1917, c. 22; Texas, Laws 1917, c. 193; Louisiana, Acts 1918, No. 98; New York, Laws 1918, c. 655; Pennsylvania, Laws 1919, Act 238; Iowa, Laws 1921, c. 122. In only two of the States is the doing of business for non-members expressly prohibited. Iowa, Laws 1921, c. 122; Texas, Laws 1917, c. 193. The rest of the statutes, though some are perhaps ambiguous in their terminology, apparently do not impose any restraint in this regard. See Nourse, The Legal Status of Agricultural Co-operation, p. 62.

[16]Michigan; Washington; California; Florida; Oregon; Colorado; Oklahoma; Pennsylvania; Iowa; New York. For the citations of these stock type laws see note 9.

[17]Nourse, The Legal Status of Agricultural Co-operation (1927), pp. 73-92.

[18]Colorado, Laws 1915, c. 57; New Mexico, Laws 1915, c. 64; Oklahoma, Laws 1917, c. 22; Texas, Laws 1917, c. 193; Louisiana, Acts 1918, No. 98; New York, Laws 1918, c. 655; Pennsylvania, Laws 1919, Act 238; Iowa, Laws 1921, c. 122.

the same right to stock co-operatives. The terms of this legislation are significant:

"That persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

"First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

"Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

"And in any case to the following:

"That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members."

Congress recognized the identity of the two classes of cooperatives, and the distinction between agricultural stock co-operative corporations and ordinary business corporations, also, by providing in the Revenue Act of 1926, c. 27, Part III, sec. 231 (44 Stat. 39), that exemption from the income tax was not to be denied "any such [co-operative] association because it has capital stock, if the dividend rate of such stock is fixed at not to exceed the legal rate of interest in the State of incorporation or 8 per centum per annum, whichever is greater, . . , and if substantially all such stock is owned by producers . . ; nor shall exemption be denied any such association because there is accumulated and maintained by it a reserve . . . Such an association may market the products of nonmembers in an amount the value of which does not exceed the value of the products marketed for members." This exemption was continued in the Revenue Act of 1928, c. 852, sec. 103 (45 Stat. 812).

More than two-thirds of all farmers' co-operatives in the United States are organized under the stock type laws. In 1925 there were 10,147 reporting organizations. Of these 68.7 per cent were

stock associations. In leading States the percentage was larger. In Wisconsin the percentage was 80.0; in North Dakota, 87.0; in Nebraska, 91.3; and in Kansas, 92.0. Of the farmers' co-operatives existing in Oklahoma in 1925, 87.6 per cent were stock associations.[19] The great co-operative systems of England, Scotland and Canada were developed and are now operated by organizations of the stock type.[20] The nonstock type of co-operative is not adapted to enterprises, which like gins require large investment in plant, and hence considerable fixed capital.[21] For this reason it was a common practice for marketing co-operatives, which had been organized as nonstock co-operatives in order to comply with the requirements of the Clayton Act above described, to form a subsidiary co-operative corporation with capital stock to carry on the incidental business of warehousing or processing which requires a large investment in plant.[22] And the fact that even the marketing of some products may be better served by the stock type of co-operative organizations is so widely recognized that most of the marketing acts provide that associations formed thereunder may organize either with or without capital stock.[23]

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[19]U. S. Dept. of Agriculture, Technical Bulletin No. 40 (1928), Agricultural Co-operative Associations, p. 88. The figures for Oklahoma are obtained from the worksheets from which the table on page 88 was compiled.

[20]See Fay, Co-operation At Home and Abroad (3rd ed. 1925), pp. 279-284, 356, 362-363; Year-Book of Agricultural Co-operation in the British Empire (1927), pp. 131-204; First Annual Report on Co-operative Associations in Canada (1928), pp. 65-78.

[21]The average investment of a plant in Texas is about $40,000. Hathcock, Possible Services of Co-operative Cotton Gins (1928), p. 5.

[22]Nourse, The Legal Status of Agricultural Co-operation, p. 54, note 3.

[23]Alabama, Laws 1921, No. 31, § 2; Arizona, Laws 1921, c. 156, § 2; Arkansas, Acts 1921, No. 116, § 3; California, Laws 1923, c. 103, § 653cc; Colorado, Laws 1923, c. 142, § 3; Florida, Acts 1923, c. 9300, § 3; Georgia, Acts 1921, No. 279, § 2; Idaho, Laws 1921, c. 124, § 3; Illinois, Laws 1923, p. 286, § 3; Indiana, Laws 1925, c. 20, § 3; Kansas, Laws 1921, c. 148, § 3; Louisiana, Acts 1922, No. 57, § 3; Maine, Laws 1923, c. 88, § 3; Minnesota, Laws 1923, c. 264, § 3; Mississippi, Laws 1922, c. 179, § 3; Montana, Laws 1921, c. 233, § 3; New Hampshire, Laws 1925, c. 33, § 2; New Jersey, Laws 1924, c. 12, § 2; New Mexico, Laws 1925, c. 99, § 3; New York, Laws 1924, c. 616, § 3; North Carolina, Laws 1921, c. 87, § 3; North Dakota, Laws 1921, c. 44, § 3; Ohio, Laws 1923, p. 91, § 2; South Carolina, Acts 1921, No. 203, § 3; South Dakota, Laws 1923, c. 15, § 2; Tennessee, Laws 1923, c. 100, § 3; Texas, Laws 1921, c. 22, § 3; Utah, Laws 1923, c. 6, § 3; Virginia, Laws 1922, c. 48, § 3; Washington, Laws 1921, c. 115, § 2; West Virginia, Acts 1923, c. 53, § 3; Wyoming, Laws 1923, c. 83, § 3.

Experience has demonstrated, also, that doing business for non-members is usually deemed essential to the success of a co-operative.[24] More than five-sixths of all the farmers' co-operative associations in the United States do business for non-members. In 1925, 86.3 per cent of the reporting organizations did so. In leading States the percentage was even larger. In Wisconsin the percentage was 89.0; in Missouri 93.2; in Minnesota 94.1; in Nebraska 95.8; in Kansas 96.5; in North Dakota 97.0. In Oklahoma 92 per cent of all co-operatives did business for non-members.[25] Of the cotton co-operatives in the United States 93.9 per cent did business for non-members. In Texas, where co-operative ginning has received successful trial,[26] all the cotton co-operatives perform service for non-members. In Oklahoma, also, all of the cotton co-operatives reporting do business for non-members.[27]

That no one plan of organization is to be labeled as truly co-operative to the exclusion of others was recognized by Congress in connection with co-operative banks and building and loan associations. See *United States* v. *Cambridge Loan & Building Company*, 278 U. S. —. With the expansion of agricultural co-operation it has been recognized repeatedly. Congress gave its sanction to the stock type of co-operative by the Capper-Volstead Act

[24]It is to be noted that statutes like the Bingham Cooperative Marketing Act (Acts of Kentucky, 1922, c. 1) which provide solely for the formation of marketing associations restrict the service of the association (with the exception of storage) to the products of members. But such statutes do not purport to repeal earlier laws authorizing agricultural cooperation for other purposes which allow business for non-members. That the legislatures recognize that the problems of cooperative marketing and of other types of agricultural co-operation require different treatment is demonstrated by the retention of general laws providing for agricultural cooperation after passage of the standard marketing act. In Oklahoma, for example, in the same year that the Act of 1917 was amended so as to embody some of the features of the Bingham Act, the 1919 Act was amended in unimportant particulars, thus receiving express legislative recognition of its continued usefulness. Laws of Oklahoma, 1923, c. 167, 181.

[25]U. S. Dept. of Agriculture, Technical Bulletin No. 40 (1928), Agricultural Co-operative Associations, p. 88. The figures for Oklahoma are obtained from the worksheets from which the table on page 88 was compiled.

[26]Hathcock, Development of Co-operative Gins in Northwest Texas, p. 4.

[27]U. S. Dept. of Agriculture, Technical Bulletin No. 40 (1928), Agricultural Co-operative Associations, p. 89. The figures for Oklahoma are obtained from the worksheets from which the table on page 89 was compiled.

and also by specifically exempting stock as well as nonstock co-operatives from income taxes. State legislatures recognized the fundamental similarity of the two types of co-operation by unifying their laws so as to have a single statute under which either type of co-operative might organize.[28] And experts in the Department of Agriculture, charged with disseminating information to farmers and legislatures, have warned against any crystallization of the co-operative plan so as to exclude any type of co-operation.[29]

That in Oklahoma a law authorizing incorporation on the stock plan was essential to the development of co-operation among farmers has been demonstrated by the history of the movement in that State. Prior to 1917 there was no statute which specifically authorized the incorporation of co-operatives. In that year the nonstock law above referred to was enacted.[30] Two years passed and only three co-operatives availed themselves of the provisions of that Act. Then persons familiar with the farmers' problems in Oklahoma secured the passage of the law of 1919, providing for the incorporation of co-operatives with capital stock.[31]

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[28]See e. g., Maryland, Laws 1922, c. 197; New York, Laws 1926, c. 231; Oregon, Supp. 1927, §§ 6954-6976. The New York Law is known as the Co-operatives Corporations Law, and consolidates all prior acts for the formation of co-operative associations. Thus, marketing co-operatives, with or without capital stock, and other agricultural co-operatives, with or without capital stock, and with or without restrictions as to business for non-members, are all organized under the same act.

[29]Chris L. Christensen, chief of the Department of Agriculture's Division of Co-operative Marketing, in Department Circular No. 403 (1926), says (p. 2), " . . . the various forms which co-operative organizations have taken demonstrate the adaptability and extensive usefulness of this form of business organization." And at page 3, "A discussion of organization types is of value only when the conditions that make certain types necessary or valuable are taken into consideration. Attempts to build co-operative associations according to any special plan have met with failure in the past, and it is possible that in the future we shall see more rather than fewer types of co-operative organizations."

[30]That the draftsmen of this law were influenced by the restrictions of the Clayton Act is evidenced by the fact that some of the language of § 2 of the 1917 Act is taken *verbatim* from § 6 of the Clayton Act.

[31]The Oklahoma State Market Commission, Carl Williams, editor of the Oklahoma Farmer-Stockman, and various farm organizations lent their assistance to the legislature in drafting this law. See Second Biennial Report of Oklahoma State Market Commission (1919-1920), p. 5; Carl Williams, Letter

Within the next five years 202 co-operatives were formed under it; and since then 139 more. In the twelve years since 1917 only 60 nonstock co-operatives have been organized; most of them since 1923, when through an amendatory statute, this type was made to offer special advantages for co-operative marketing.[32] Thus over 82 per cent of all co-operatives in Oklahoma are organized under the 1919 stock act. One hundred and one Oklahoma co-operative cotton gins have been organized under the 1919 stock law; not a single one under the 1917 nonstock law.[33] To deny the co-operative character of the 1919 Act is to deny the co-operative character not only of the gins in Oklahoma which farmers have organized and operated for their mutual benefit, but also that of most other co-operatives within the State, which have been organized under its statutes in harmony with legislation of Congress and pursuant to instructions from the United States Department of Agriculture. A denial of co-operative character to the stock co-operatives is inconsistent also with the history of the movement in other States and countries. For the stock type of co-operative is not only the older form, but is the type more widely used among English speaking peoples.

There remains to be considered other circumstances leading to the passage of the statute here challenged. As was said in *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78, "When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be as-

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to Division of Co-operative Marketing, Department of Agriculture, dated January 21, 1929. The Oklahoma State Market Commission says of the 1919 Act (Marketing Bulletin, April 20, 1920, p. 5), "In organizing these new corporations, the farmers had a real basis on which to organize . . . The law was written by men who understood the farmers condition and had some practical knowledge of real cooperative marketing on a business basis. The laws of Minnesota, Nebraska and other states were studied. Conditions under which cooperative associations had failed in the northern states and those which had succeeded were taken into careful consideration. The best points from the laws of the several states, which would be suitable for Oklahoma conditions were incorporated and the features of these laws which were not suitable were eliminated."

[32]Laws 1923, c. 181.

[33]All figures here given are obtained from the files of the Department of Agriculture, Division of Co-operative Marketing.

sumed." Here that presumption is reinforced by facts which have been called to our attention. That evils exist in cotton ginning which are subject to drastic legislative regulation has recently been recognized by this Court. *Crescent Oil Co.* v. *Mississippi*, 257 U. S. 129. The specific evils existing in Oklahoma which the statute here assailed was enacted to correct was the charging of extortionate prices to the farmer for inferior ginning service and the control secured of the cotton seed.[34] These conditions are partly attributable to the fact that a large percentage of the ordinary commercial gins in Oklahoma are controlled by cotton seed oil mills; which make their service as ginners incidental to that as crushers of seed; and are thereby enabled to secure the seed at less than its value.[35] That such control of gins may lead to excessive prices for the ginning service was recognized

[34]Two of the leading farm newspapers in Oklahoma are the Oklahoma Cotton Grower and the Oklahoma Farmer-Stockman, the latter edited by Carl Williams. In an editorial on February 10, 1926, the Cotton Grower urges farmers to form co-operative gins as the only way to obtain economy in ginning service. On March 1, 1927, the Farmer-Stockman contains an editorial urging, as a partial solution of the ginning problem, the placing of members on the Corporation Commission who are interested in the farmer as well as in the commercial gin. On May 15, 1927, the same paper notes the great increase in co-operative ginning in the State, and says that it is due to the extortionate prices charged by private ginners. On August 15, 1927, the Farmer-Stockman speaks of the meeting of the Corporation Commission to fix rates for ginning as the "annual farce." It is stated that the meeting is called a farce because the rate is always set high enough so as to allow grossly excessive returns to the ginners at the expense of the farmers. The editor states that the only solution for the farmer is co-operation in ginning. On September 15, 1927, the same paper states that some privately owned gins have averaged a profit of over 100 per cent on invested capital over a period of three years. On October 15, 1927, the Farmer-Stockman notes that poor ginning can cost the farmer at least four cents on each pound of cotton.

[35]The District Court said (26 F. (2d) 508, 519-520): "The ordinary commercial ginner within the State of Oklahoma may gin either as an individual, a copartnership, or a corporation; no statute, rule, or provision of law restricts him in any wise in the enjoyment of the full proceeds of the earnings under the rate fixed. He usually is engaged, not only in ginning cotton, but also in the purchase of seed cotton, cotton seed after he has ginned the cotton, and frequently in the purchase of the cotton after it is ginned for profit. A ginner has a greater facility to purchase the seed than anyone else. As he gins the cotton, he catches the seed as they fall from the stand, and has the immediate means for storage and housing same. The patron, if he does not elect to sell to the ginner, must receive them and haul them away, when

in the *Crescent Oil* case. The fact that, despite the regulatory provisions of the Public Service law, a public utility is permitted to earn huge profits indicates that something more than rate regulation may be needed for the protection of farmers. Certainly, it cannot be said that the legislature could not reasonably believe that co-operative ginning might afford a corrective for rates believed to be extortionate.

Mr. Justice HOLMES and Mr. Justice STONE join in this opinion.

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as a rule he has no place for storage for accumulating as much as a carload, so as to sell them to advantage. A great per cent. of the gins so operated are owned and controlled by cotton seed crushers, operating cotton seed oil mills within the state of Oklahoma; such operation of gins not being entirely for the purpose of rendering a public service, but also for collecting cotton seed at a central point. Their gin business as ginners is incidental to that as crushers of seed, to the end that they may be enabled to purchase the seed under favorable conditions. See Choctaw Cotton Oil Co. *v.* Corporation Commission, 121 Okl. 51, 247 P. 390; Planters' Cotton & Ginning Co. *v.* West, 82 Okl. 145, 198 P. 855."

SUPREME COURT OF THE UNITED STATES.

No. 60.—October Term, 1928.

W. A. Frost, doing business under the name of Mitchell Gin Co., Appellant, *vs.* Corporation Commission of the State of Oklahoma, Fred Capshaw, et al. } Appeal from the District Court of the United States for the Western District of Oklahoma.

[February 18, 1929.]

Dissenting opinion of Mr. Justice Stone.

I agree with what Mr. Justice Brandeis has said. But there is one aspect of the decision now rendered to which I would especially direct attention. To me it would seem that there are such differences in organization, management, financial structure and practical operation between the business conducted by appellant, a single individual, and that conducted by a corporation organized as is appellee, as to justify the classification and discrimination made by the statute. But, assuming there were no such differences, I fail to perceive any constitutional ground on which appellant can complain of a discrimination from which he has not suffered. His real and only complaint is not that he has been discriminated against either in the grant or enjoyment of his license, but that in the exercise of his non-exclusive privilege of carrying on the cotton ginning business he will suffer from competition by the corporate appellee which, under local law, may secure a like privilege with possibly less difficulty than did appellant.

The proviso of the 1925 Act is held unconstitutional solely on the ground that "an onerous restriction upon the right to engage in a public business" was "imposed by the statute upon appellant" and others similarly situated, which was not imposed on appellee. Appellant, if he had been denied a license, or if his exercise of the privilege, when granted, were more limited by the statute than that of appellee, might invoke the equal protection clause. But he now requires no such protection for he has received his license

and is in full and unrestricted enjoyment of the same privilege as that which the appellee seeks. This is not less the case even if the statute be assumed to have made it more difficult for him than for appellee to secure a license.

Whether the grant appellant has received be called a franchise or a license would seem to be unimportant, for in any case it is not an exclusive privilege. Under the Constitution and laws of Oklahoma the legislature has power to amend or repeal the franchise, Constitution of Oklahoma, Art. IX, § 47; *Choctaw Cotton Oil Co.* v. *Corporation Comm.*, 121 Okla. 51, and injury suffered through an indefinite increase in the number of appellant's competitors by non-discriminatory legislation, would clearly be *damnum absque injuria*. A similar increase under the present alleged discriminatory statute would seem likewise to afford appellant no legal cause for complaint, for, a license not having been withheld from him, his position is precisely the same as though the statute authorized the grant of a license to him and to appellee on equal terms. He is suffering, not from any application of the discriminatory feature of the statute, with which alone the Constitution is concerned, see *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, 576; *Arkadelphia Co.* v. *St. Louis Southwestern Ry. Co.*, 249 U. S. 134, 149, but merely from the increase in the number of his competitors, an injury which would similarly have resulted from a non-discriminatory statute granting the privilege to all on terms more lenient than those formerly accorded appellant. Of such a statute, appellant could not complain and I can find no more basis for saying that constitutional rights are impaired where the discrimination which the statute authorizes has no effect, than where the statute itself does not discriminate.

Nor would appellant seem to be placed in any better position to challenge the constitutionality of the statute by recourse to the rule that the possessor of a non-exclusive franchise may enjoin competition unauthorized by the state. Appellee's business is not unauthorized. It is carried on under the sanction of a statute to which appellant himself can offer no constitutional objection, for even unconstitutional statutes may not be treated as though they had never been written. They are not void for all purposes and as to all persons. See *Hatch* v. *Reardon*, 204 U. S. 152, 160. For appellant to say that appellee's permit is void, and that its business may

be enjoined, because conceivably someone else may challenge the constitutionality of the Act, would seem to be a departure from the salutary rule consistently applied that only those who suffer from the unconstitutional application of a statute may challenge its validity. See *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 544; *Tyler* v. *Judges of Court of Registration*, 179 U. S. 405, 410; *Cusack Co.* v. *Chicago*, 242 U. S. 526, 530; *Standard Stock Food Co.* v. *Wright*, 225 U. S. 540, 550; *Mallinckrodt Chemical Works* v. *Missouri*, 238 U. S. 41, 54; *Darnell* v. *Indiana*, 226 U. S. 390, 398.

It seems to me that a fallacy, productive of unfortunate consequences, lurks in the suggestion that one may maintain a suit to enjoin competition of a business solely because hereafter someone else might suffer from an unconstitutional discrimination and enjoin it. But, more than that, even if the license had been withheld from appellant because he could not support the burden placed upon him by the statute, I should have thought it doubtful whether he would have been entitled to have had appellee's permit cancelled—the relief now granted. He certainly could not have asked more than the very privilege which he now enjoys.

Mr. Justice HOLMES and Mr. Justice BRANDEIS concur in this opinion.